UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re CHEMBIO DIAGNOSTICS, INC. SECURITIES LITIGATION

THIS DOCUMENT RELATES TO:
ALL ACTIONS

Civil Action No. 2:20-cv-02706-ARR-JMW
(Consolidated)

JOINT DECLARATION OF LAWRENCE M. ROLNICK AND DAVID A. ROSENFELD IN SUPPORT OF (A) LEAD PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION AND (B) LEAD COUNSELS' MOTION FOR AN AWARD OF ATTORNEYS' FEES AND LITIGATION EXPENSES AND AN AWARD TO LEAD PLAINTIFF PURSUANT TO 15 U.S.C. §78u-4(a)(4)

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We, Lawrence M. Rolnick and David A. Rosenfeld, respectfully submit this declaration in support of the motion for final approval of the proposed Settlement and Plan of Allocation filed by Lead Plaintiffs Municipal Employees' Retirement System of Michigan ("MERS"), Special Situations Fund III QP, L.P. ("Fund III"), Special Situations Cayman Fund, L.P. ("Cayman Fund"), and Special Situations Private Equity Fund, L.P. ("PE Fund," and collectively with Fund III and Cayman Fund, the "Funds," and collectively with MERS, "Lead Plaintiffs"), and Lead Counsel's motion for an award of attorneys' fees and litigation expenses and award to Lead Plaintiff, and we hereby declare as follows[1]:

I. INTRODUCTION

1. Lawrence M. Rolnick and David A. Rosenfeld are, respectively, partners in the law firms of Rolnick Kramer Sadighi LLP ("RKS") and Robbins Geller Rudman & Dowd LLP ("Robbins Geller"). Together, our firms have been appointed Lead Counsel for the Class. We have personal knowledge of the matters set forth herein based on our active supervision of and participation in the prosecution and settlement of the claims asserted in this action.

2. We respectfully submit this Declaration in support of Lead Plaintiffs' motion, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, for final approval of the proposed settlement (the "Settlement") that the Court preliminarily approved by its February 3, 2023 Opinion & Order granting preliminary approval and authorizing notice to the Class (the "Preliminary Approval Order") (ECF No. 121).

3. This Declaration sets forth how Lead Counsel and Lead Plaintiffs were able to achieve this highly favorable Settlement, on behalf the Class, with Defendants Chembio

[1] Unless otherwise noted, all capitalized terms herein have the meanings ascribed to them in the Stipulation and Agreement of Settlement, dated December 28, 2022 (the "Stipulation") (ECF No. 117-2).

Diagnostics, Inc. ("Chembio" or the "Company"); Richard L. Eberly, Gail S. Page, Neil A. Goldman, Javan Esfandiari, Katherine I. Davis, Dr. Mary Lake Polan, Dr. John G. Potthoff (the "Individual Defendants" and together with Chembio, the "Chembio Defendants"); and Robert W. Baird & Co. Inc., and Dougherty & Company LLC (the "Underwriter Defendants" and, with the Chembio Defendants ("Defendants")). We also respectfully submit this Declaration in support of: (i) Lead Plaintiffs' motion for approval of the proposed plan for allocating the proceeds of the Net Settlement Fund to eligible Class Members (the "Plan of Allocation"); and (ii) Lead Counsel's motion for an award of attorneys' fees in the amount of 24% of the Settlement Fund, and of litigation expenses in the amount of $16,339.68, and award to Lead Plaintiff MERS in the amount of $3,600.[2]

4. The proposed Settlement provides for the resolution of all claims against the Defendants in exchange for a cash payment of $8.1 million. As detailed herein, Lead Plaintiffs and Lead Counsel respectfully submit that the Settlement represents a very favorable result for the Class, especially in light of the significant risks to recovery in the Action. As explained further below, the Settlement provides a considerable benefit to the Class by conferring a substantial, certain and immediate recovery while avoiding the significant risks and expense of continued litigation, including the risk that the Class could recover substantially less than the Settlement Amount (or nothing) after years of additional litigation and delay, and the substantial risk to recovery resulting from Chembio's poor financial situation.

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[2] In conjunction with this Declaration, Lead Plaintiffs and Lead Counsel, respectively, are also submitting a Memorandum of Law in Support of Motion for Final Approval of Class Action Settlement and Approval of Plan of Allocation (the "Settlement Memorandum") and a Memorandum of Law in Support of Motion for an Award of Attorneys' Fees and Litigation Expenses and an Award to Lead Plaintiff Pursuant to 15 U.S.C. §78u-4(a)(4) (the "Fee Memorandum").

5. The proposed Settlement is all the more remarkable given that – at the time the parties agreed to settle the claims – the Court had dismissed all claims in the Action except for the Securities Act claims against the Underwriter Defendants. But for Lead Plaintiffs' efforts in negotiating the present resolution, there is a significant chance that the Class would have recovered far less, or nothing at all, after further costly and time-consuming litigation.

6. The proposed Settlement is the result of extensive efforts by Lead Counsel, which included, among other things detailed herein: (i) conducting a wide-ranging investigation of Defendants' misrepresentations and material omissions made during the period from March 12, 2020 through June 16, 2020, inclusive (the "Settlement Class Period" or "Class Period"), principally concerning Chembio's DPP COVID-19 Test and alleged false statements and material omissions about the Test's performance and the data underlying the FDA's approval for distribution of the Test; (ii) drafting initial complaints, filed with the Court in June 2020 and August 17, 2020; (iii) drafting a Consolidated Amended Complaint (the "Complaint"), filed with the Court on February 12, 2021 (ECF No. 64); (iv) researching and drafting a memorandum of law in opposition to Defendants' motion to dismiss the Complaint for failure to state a claim, filed with the Court on April 16, 2021 (ECF No. 88); (v) researching and drafting a motion for partial reconsideration of the Court's order granting in part Defendants' motion to dismiss, filed with the Court on March 9, 2022 (ECF No. 99); (vi) drafting a Second Consolidated Amended Complaint (the "Amended Complaint"), filed with the Court on July 26, 2022 (ECF No. 107); (vii) consulting with economic and damages experts and consultants; (viii) preparing a detailed damages analysis; (ix) researching and drafting detailed mediation submissions; and (x) negotiating this proposed settlement on an arm's-length basis through an experienced mediator, Jed D. Melnick, Esq. of JAMS (the "Mediator").

7. Lead Plaintiffs and Lead Counsel believe that the Settlement is in the best interests of the Class. Due to their efforts described in the foregoing paragraph, Lead Plaintiffs and Lead Counsel are well informed of the strengths and weaknesses of the claims and defenses in the Action, and they believe the Settlement represents a highly favorable outcome for the Class.

8. As discussed in further detail below, the Plan of Allocation provides for the *pro rata* distribution of the Net Settlement Fund to Class Members who submit valid Claim Forms and who suffered recognized losses in connection with their purchases or acquisitions of Chembio stock.

9. The Plan of Allocation was developed with the assistance of Lead Plaintiffs' damages expert. In addition, the parties engaged the Mediator, who, in an arm's-length process, assisted Lead Counsel in determining how the settlement proceeds would be allocated between those Class Members with claims under the Securities Exchange Act of 1934 (the "Exchange Act") and those Class Members with claims under the Securities Act of 1933 (the "Securities Act").

10. The Plan of Allocation reflects a reasonable and good faith allocation between the Exchange Act and Securities Act claims, taking into account, among other factors, the relative strengths and weaknesses of each claim (including that the Exchange Act claims had been dismissed with prejudice by the Court), the amount of potential damages recoverable by each of the Exchange Act and Securities Act claims, and the number of potential claimants against the funds allocated to the Exchange Act and Securities Act claims, specifically the fact that there are only 2.6 million potentially damaged shares in connection with the Securities Act claims and more than 15 million damaged shares in connection with the Exchange Act claims.

11. With respect to the Fee and Expense Application, as discussed in the Fee Memorandum, the requested fee of 24% of the Settlement Fund for Lead Counsel is in line with,

if not below, such awards in the Second Circuit in complex securities class actions. Additionally, the requested fee results in a multiplier of 1.15 on Lead Counsel's lodestar, which is well within the range of multiples routinely awarded by courts in the Second Circuit and across the country.

12. For all of the reasons set forth herein and in the accompanying Memoranda, including the quality of the result obtained and the numerous significant risks to recovery more fully discussed below, Lead Plaintiffs respectfully submit that the Settlement and the Plan of Allocation are fair, reasonable and adequate, and should be approved. In addition, Lead Counsel also respectfully submit that their request for attorneys' fees and Litigation Expenses and award to Lead Plaintiff is fair and reasonable, and should be approved.

II. INVESTIGATION AND PROSECUTION OF THE ACTION

A. Background

13. This case concerns claims of fraud and misrepresentation by Chembio, a diagnostic testing manufacturer, along with certain of its directors and officers and the investment banks that served as the Company's underwriters, related to an ineffective diagnostic COVID-19 antibody test.

14. As Lead Plaintiffs allege, Chembio was perfectly positioned to take advantage of the strong demand for diagnostic and serological testing at the start of the COVID-19 pandemic. In early 2020, Chembio shifted its entire business model to focus solely on the COVID-19 market and quickly adapted its preexisting Dual Path Platform ("DPP") technology to create an antibody test for COVID-19. Chembio announced its intention to create a COVID-19 antibody test using its DPP technology on March 12, 2020, causing the Company's shares to increase by 65% during pre-market trading. Only eight days later, on March 20, 2020, Chembio announced that the DPP platform had already enabled it to develop a high quality test. Chembio's DPP COVID-19 IgM/IgG System (the "DPP COVID- 19 Test," or the "Test") was one of the first antibody tests to

receive Emergency Use Authorization ("EUA") from the FDA in the competitive and highly lucrative COVID-19 market.

15. The Complaint further alleges, however, that less than two weeks after being granted the EUA, the FDA notified Chembio that it had serious concerns with the reliability and accuracy of the Test and with the data the Company had submitted to support the EUA application. In response, Chembio submitted supplemental data to the FDA in an attempt to maintain its EUA, but this data further demonstrated issues with the Test's performance and indicated that Chembio's prior data was unreliable. The FDA reiterated its concerns, and when Chembio still could not produce adequate data, the FDA revoked the Test's EUA. The Test was Chembio's sole focus at the time, but none of this adverse information was disclosed to investors.

16. Lead Plaintiffs allege that instead of being truthful with investors, the Chembio Defendants represented to investors that the Company had received the EUA, that the data in support of the EUA application for the Test had been reviewed by the FDA and was reliable, that the Test was 100% accurate in detecting antibodies by eleven days after infection, and made further statements highlighting the Test's commercial viability. The Complaint alleges that Defendants omitted to disclose this material factual information to investors.

17. Certain of these allegedly false statements were included in, and material facts allegedly omitted from, a Form S-1 Registration Statement by which Chembio registered and sold more than $30 million worth of stock directly to investors in a May 7, 2020 registered public offering. These included Defendants' statement that the Test was "100% effective" after eleven days.

18. The Complaint further alleges that due to these misrepresentations and omissions, the price of Chembio common stock was artificially inflated, and declined when the truth was

revealed on June 17, 2020. Lead Plaintiffs allege that on that date, the FDA issued a press release disclosing that it had revoked its EUA for the Company's DPP COVID-19 Test "due to performance concerns with the accuracy of the test." The press release also included as an attachment a letter addressed to Chembio dated June 16, 2020 (the "FDA Letter"), notifying the Company of the Revocation and elaborating on how the FDA reached its decision.

19. The press release and FDA Letter issued to the Company allegedly revealed what Chembio had concealed from the market for months – serious efficacy issues regarding the Test and the risk that the FDA would reject the test because of those efficacy issues.

20. In response to this disclosure, Lead Plaintiffs allege that the price of Chembio's common stock declined in a statistically significant manner, causing members of the Class harm.

B. The Preparation and Filing of the Initial Complaints

21. This lawsuit was commenced on June 18, 2020, when a putative class member filed a class action complaint in this Court. (ECF No. 1).

22. This initial complaint alleged claims for violations of Sections 10(b) and 20(a) of the Exchange Act, on behalf of all persons who purchased Chembio's common stock between April 1, 2020 and June 16, 2020, inclusive.

23. On August 17, 2020, co-Lead Plaintiff the Funds filed their own securities class action complaint in this Court. This complaint alleged claims for violations of Sections 10(b) and 20(a) of the Exchange Act, on behalf of all persons who purchased Chembio's common stock between April 1, 2020 and June 16, 2020, inclusive. It also alleged claims for violations of Sections 11, 12(a)(2) and 15 of the Securities Act, on behalf of all persons who purchased Chembio common stock directly in or traceable to the Company's May 7, 2020 offering (the "May Offering") pursuant to Chembio's Form S-3 Registration Statement and its Prospectus and

Prospectus Supplement, dated May 7, 2020 (together, the "Registration Statement"). This claim added the Underwriter Defendants, who underwrote the May Offering and are thus statutory defendants under the Securities Act, to the case.

24. In preparation for filing this initial complaint, co-Lead Counsel conducted a robust factual investigation and legal analysis that included, among other things, review and analysis of: (i) documents filed publicly by Defendant Chembio with the U.S. Securities and Exchange Commission ("SEC"); (ii) Chembio press releases and other public statements; (iii) transcripts of Chembio investor conference calls; (iv) research reports by financial analysts concerning Chembio; and (v) information concerning the pricing and movement in Chembio common stock and other securities. Lead Counsel also conducted an in-depth analysis of applicable Second Circuit case law.

C. The Appointment of Lead Plaintiffs and the Preparation and Filing of the Complaint

25. On August 17, 2020, the Funds and MERS filed motions seeking to be appointed lead plaintiffs pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA"), and seeking appointment of their selected counsel, RKS (for the Funds) and Robbins Geller (for MERS), as Lead Counsel for the Class. (*See* ECF Nos. 22, 36). Certain other movants filed competing motions. (*See* ECF Nos. 20, 25, 28, 30, and 34). Magistrate Judge Arlene R. Lindsay thereafter granted each of the Funds' and MERS' motions, consolidating all pending Chembio-related securities class actions,[3] appointing the Funds and MERS as Lead Plaintiffs and approving their selection of RKS and Robbins Geller as Lead Counsel for the Class. (*See* ECF Nos. 54, 58).

[3] The two other related class actions were *Gowen v. Chembio Diagnostics, Inc.*, No. 20-cv-2758 (E.D.N.Y.), and *Bailey v. Chembio Diagnostics, Inc.*, No. 20-cv-2961 (E.D.N.Y.).

26. On February 12, 2021, Lead Plaintiffs filed a Consolidated Amended Complaint for Violations of the Federal Securities Laws (the "Complaint"). (ECF No. 64). The Complaint alleged claims for violations of Sections 11, 12(a)(2) and 15 of the Securities Act, on behalf of a class consisting of all persons who purchased Chembio common stock directly in or traceable to the Company's May Offering. It also alleged claims for violations of Sections 10(b) and 20(a) of the Exchange Act, on behalf of a class consisting of all persons who purchased Chembio securities on the open market between March 12, 2020 and June 16, 2020, inclusive.

27. Before filing the Complaint, Lead Counsel conducted further investigation and analysis of the potential claims that could be asserted on behalf of investors in Chembio securities. This investigation included, among other things, a detailed review and analysis of significant volumes of information related to Chembio, including (i) Chembio's SEC filings; (ii) transcripts of Chembio's investor conference calls, press releases, and publicly available presentations; (iii) a significant volume of news and securities analyst reports regarding Chembio; and (iv) the pricing and movement of Chembio's common stock. In addition to this expanded factual investigation, Lead Counsel further researched and analyzed the law applicable to the claims asserted, other potential claims and Defendants' potential defenses.

28. In total, the Complaint contained nearly ninety pages of detailed factual allegations, reflecting the facts gleaned from, and legal theories behind, Lead Counsel's investigation.

D. Defendants' Motion to Dismiss

29. On March 26, 2021, the Chembio Defendants filed a motion to dismiss the Complaint, in full and with prejudice (the "Motion to Dismiss"). (ECF No. 84). The Motion to Dismiss attacked numerous elements of Lead Plaintiffs' claims, arguing that the Complaint did not allege actionable misstatements and omissions in support of either the Securities Act or

Exchange Act claims; that Lead Plaintiffs' Securities Act claims "sounded in fraud" and thus were subject to the particularly requirements of Fed. R. Civ. P. 9(b); that the Complaint did not allege the requisite cogent and compelling inference of scienter necessary to plead a claim for securities fraud under the PSLRA; and that Lead Plaintiffs' claims against the Individual Defendants under Section 12(a)(2) of the Securities Act should be dismissed for the additional reason that those Defendants are not "statutory sellers" under the law. (*See* ECF No. 84-3). The Underwriter Defendants filed an accompanying Joinder (*see* ECF No. 85), asking the Court to dismiss the Section 11, 12(a)(2), and 15 claims against them for the reasons set forth in the brief filed by the Chembio Defendants.

30. Lead Plaintiffs opposed the Motion to Dismiss on April 16, 2021. (ECF No. 88). First, with respect to the Chembio Defendants' arguments that the Complaint sounded in fraud, Lead Plaintiffs argued that the Complaint satisfied the Second Circuit's standards for separating the scienter-based Exchange Act claims from the Securities Act claims, which only required negligence. Lead Plaintiffs also explained why the Complaint adequately alleged material misstatements and omissions related to the efficacy of the DPP COVID-19 Test as well as FDA correspondence and communications questioning the Test itself (as well as the data submitted by Chembio in support of it).

31. On February 23, 2022, the Court granted in part and denied in part the Motion to Dismiss (the "MTD Order"). (ECF No. 93). With respect to the Exchange Act claims, the Court concluded that the Complaint did not contain plausible allegations of motive and opportunity, or conscious recklessness, sufficient to allege scienter under Second Circuit law. The Court also concluded that the Complaint did not adequately allege corporate scienter against Chembio. As such, the Court dismissed those claims, with prejudice.

32. With respect to the Securities Act claims, the MTD Order found that the claims against the Chembio Defendants sounded in fraud, and thus were subject to Rule 9(b), but the claims against the Underwriter Defendants did not, and thus they were only subject to Rule 8(a) notice pleading. Applying these standards, the Court dismissed the claims against the Chembio Defendants because the Complaint did not support a compelling inference of fraud against those Defendants with respect to alleged misstatements in and omissions from the Registration Statement issued in connection with the May Offering. The Court, however, found that material information was omitted from the Registration Statement – specifically, that Chembio had received test data that contradicted its claim that the DPP COVID-19 Test as 100% accurate in detecting antibodies after eleven days. By alleging that this material and contradictory data was omitted from the Registration Statement, the Court found that the Complaint stated a claim for violation of SEC Regulation S-K, including Item 105.

33. Accordingly, the Court sustained the Securities Act claims against the Underwriter Defendants and gave Lead Plaintiffs the opportunity to replead those claims against the Chembio Defendants.

E. The Motion for Reconsideration

34. Lead Plaintiffs sought partial reconsideration of the MTD Order on March 9, 2022 (the "Partial Reconsideration Motion"). (ECF No. 98). Lead Plaintiffs asked the Court to reconsider its decision to dismiss the Exchange Act claims with prejudice, arguing that the Court's conclusion that Chembio knew by April 29, 2020 that the Test was less accurate than stated – and thus the EUA was at risk of being revoked – could support a finding of scienter under Second Circuit law. As to the Securities Act claims, Lead Plaintiffs asked the Court to revisit its rulings

that the Securities Act claims against the Chembio Defendants sounded in fraud and, if they did sound in fraud, that Lead Plaintiffs had to allege scienter in support of those claims.

35. The Chembio Defendants opposed the Partial Reconsideration Motion (ECF No. 101), and on July 21, 2022 the Court denied the Motion (ECF No. 106). Explaining that reconsideration is an "extraordinary remedy," the Court found that Lead Plaintiffs had not met the heavy burden required to show that its prior ruling merited reconsideration. The Court adhered to its prior rulings, including giving Lead Plaintiffs the right to file an amended complaint against the Chembio Defendants for the Securities Act claims.

F. The Preparation and Filing of the Amended Complaint

36. Three days after the Court issued its order denying Lead Plaintiffs' Partial Reconsideration Motion, Lead Plaintiffs filed their Second Consolidated Amended Complaint for Violations of the Federal Securities Laws (the "Amended Complaint"). (ECF No. 107).

37. Consistent with the Court's prior orders, the Amended Complaint restated its negligence-based Securities Act claims against the Underwriter Defendants. The Amended Complaint also repleaded Securities Act claims against the Chembio Defendants, which claims were meritorious because they were based on the same false and misleading statements in, and omissions from, the Registration Statement that the Court had found stated actionable claims against the Underwriter Defendants.

38. The Amended Complaint totaled forty-two pages and more than 200 paragraphs of detailed factual allegations. The Amended Complaint did not include claims under the Exchange Act although it included a statement expressly reserving Lead Plaintiffs' rights to appeal any previously dismissed claims or defendants.

G. The Negotiation and Preliminary Approval of the Settlement

39. Due in part to the failure of its DPP COVID-19 Test, Chembio has struggled financially. In the Company's 2021 Annual Report, filed on Form 10-K with the SEC on March 2, 2022, Chembio issued "going concern" warnings, meaning that there is substantial doubt about Chembio's ability to comply with its debt covenants and otherwise continue as a going concern. The Company's quarterly reports issued during 2022, as well as its 2023 Annual Report, issued last month, repeated these warnings.

40. In addition, Chembio is under a contractual obligation to indemnify the Underwriter Defendants for costs incurred in connection with this suit. This indemnification obligation means that the Underwriters' substantial legal fees incurred in defending the case would further (and quickly) erode Chembio's available free cash, because those costs are not themselves insurable by Chembio.

41. Driven in part by concerns over the Company's tenuous financial position, as well as the strength of Lead Plaintiffs' claims, Plaintiffs and Defendants began a dialogue concerning possible early partial resolution of the Action. Absent this early resolution, it is unlikely that Lead Plaintiffs and Lead Counsel would have been able to achieve any recovery for the Class whatsoever, if indeed Chembio became insolvent and needed to seek protection under the bankruptcy laws.

42. Accordingly, on July 14, 2022, the parties, along with Chembio's insurance carriers, participated in a mediation (the "Mediation") with Jed D. Melnick, Esq. (the "Mediator") of JAMS (with some participants in person and some participating via Zoom). In advance of that session, the parties prepared extensive confidential mediation statements and exhibits that addressed issues of liability, damages and collectability. During the session, the Mediator met

with each of the parties and carrier representatives, and each discussed in detail the merits of the case, including liability and damages. The parties also discussed Defendants' available resources to pay a potential judgment, if any, including any available but rapidly declining insurance resources. The parties negotiated in good faith and at arm's-length, but no agreement was reached during that mediation session.

43. In connection with this effort, Lead Plaintiffs engaged a financial expert to advise on issues of loss causation and class-wide damages. In consultation with their consulting expert, Lead Plaintiffs calculated damages for the Securities Act claims and those for the Exchange Act claims. For the Securities Act claims, Lead Plaintiffs applied the statutory damages formula in Section 11, 15 U.S.C. §77k(e), which (as relevant here) measures damages as the difference between the price at which the security was offered to the public and the price of the security on the day the suit was brought. The price of Chembio common stock in the May 2020 Offering was $11.75 per share, and the price on August 17, 2020, the date the Funds filed their Section 11 claims, was $5.30 per share (a difference of $6.45). Because there were approximately 2.621 million shares issues in the Offering, the maximum damages available in connection with the Offering were approximately $16.9 million. With respect to the Exchange Act claims, Lead Plaintiffs calculated the amount of artificial inflation in the price of Chembio common stock by considering price changes in that stock in reaction to public disclosures allegedly revealing the truth concerning Defendants' alleged misrepresentations and material omissions, adjusting for price changes that were attributable to market or industry forces. As part of this analysis, Lead Plaintiffs utilized a "two-trader" model run from March 12, 2020 through and including June 16, 2020, to estimate that approximately 15 million shares were traded in the Class Period, and thus damaged by artificial inflation in the price of Chembio common stock caused by Defendants'

allegedly false and misleading statements to the market. Lead Plaintiffs then took into account the decline in Chembio's stock price on June 17, 2020 -- the date the FDA Letter was revealed to the market -- and the PSLRA's 90-day "look-back" limitation on damages, *see* 15 U.S.C. §78u-4(e), which reduces overall damages because Chembio's stock price generally increased in the period following the June 17, 2020 disclosure.

44. Based on these assumptions, Lead Plaintiffs calculated Exchange Act damages of approximately $49 million, which reflects the assumed class wide market loss based on the artificial inflation in Chembio common stock that dissipated on June 17, 2020, as well as the offsetting (damage-reducing) effects of the statutory look-back and market and industry -- non-fraud -- factors that impacted Chembio's stock price. Lead Plaintiffs further took into account that 2.6 million of the 15 million Exchange Act damaged shares were issued in connection with the May Offering, so they could not also count in the Exchange Act calculation. After removing those damaged shares, Lead Plaintiffs estimated an Exchange Act damages calculation of $41.5 million.[4]

45. As the foregoing demonstrates, estimated potential class-wide damages can be no more than $58.4 million for both the Securities and Exchange Act claims, meaning that the

[4] Because it is not possible to access individual investor trading data in a securities class action, Lead Plaintiffs, like all parties in such cases, must estimate aggregate damages. A "two-trader" model is a widely accepted mathematical model used to estimate individual investor trading model activity and aggregate damages in class action securities cases. In simplified terms, it assumes there are both active and passive traders in the market on any given day, and that active traders account for a larger portion of aggregate trading activity but hold a relatively smaller amount of the available stock (the "float") on a given day. Conversely, passive traders are a smaller portion of trading but hold a larger amount of stock. Based on the trading volume of stock and the "float" on a given day, the two-trader model generates an estimate of the number of shares purchased by both active and passive traders and aggregates those shares. That number (of shares) is used to estimate the number of shares damaged by fraud-related inflation on a given day during the class period, and thus – when aggregated – class-wide damages.

proposed Settlement is equivalent to approximately 14% of total damages.[5] Indeed, even after subtracting Lead Plaintiffs' requested attorneys' fees and expenses, the Net Settlement Fund represents approximately 10% of estimated damages.

46. Following the conclusion of the July 14, 2022 Mediation, and after further arms'-length negotiations through and under the supervision of the Mediator, the Parties reached an agreement in principle to settle the Action for, *inter alia*, Lead Plaintiffs' agreement to release all claims asserted in the Action, including the dismissed Exchange Act claims, in return for a cash payment of $8.1 million, to be paid exclusively by Chembio's insurance carriers for the benefit of the Class.

47. The $8.1 million cash payment represents a substantial portion of Chembio's available director's and officer's liability insurance policy, after accounting for defense attorneys' fees that have been and will be incurred by Defendants. This recovery constitutes nearly all available cash proceeds, because the Company has little unrestricted cash with which it could fund a potential settlement, as described *infra* at ¶¶55-58. The Underwriter Defendants are not contributing to the Settlement because they have indemnification claims against Chembio based on the indemnification agreement the Underwriter Defendants and Chembio entered into in connection with the May 2020 Offering. Those substantial claims – Chembio is obligated to pay any judgment against the Underwriter Defendants and pay their legal fees – are being released in connection with the Settlement.

48. Following additional arms'-length negotiations, the Parties executed the Stipulation on December 28, 2022, which along with the exhibits thereto – including the Class Notice – sets

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[5] Before fees and expenses, the $5.09 million allocated to the Securities Act claimants represents a recovery of 30% for those investors, while the remaining $3.01 million allocated to the Exchange Act claimants represents a recovery of 7.25% for those investors.

forth the final and binding agreement to settle the Action. The Stipulation was submitted to the Court for preliminary approval on the same day. (ECF No. 117-2).

49. On February 3, 2023, the Court preliminarily approved the Settlement (the "Preliminary Approval Order"), certified the Class, appointed Lead Plaintiffs as Class representatives and appointed Lead Counsel as Class counsel. (ECF No. 121). The Court also directed that notice be provided promptly to the Class.

50. The Mediator, Jed Melnick, has submitted a declaration in support of the Settlement (*See* Declaration of Jed D. Melnick, Esq. in Support of Final Approval of Settlement and Proposed Plan of Allocation ("Melnick Decl."), submitted herewith). He explains, among other things,[6] that the Settlement was only achieved after robust, arms'-length negotiations, and that it is his belief that the Settlement is a well-reasoned and sound resolution of the complicated and uncertain legal claims asserted in the Action. (*See* Melnick Decl. at ¶2). Mr. Melnick – who has mediated over one thousand disputes, including complex securities class actions – further explains that, from his perspective, the Settlement is reasonable, was negotiated at arms' length, and is consistent with the risks and potential rewards of the claims asserted by Lead Plaintiffs. *Id.* at ¶3.

H. The SEC Announces Settled Charges Against Chembio Based on the Misstatements in the May 2020 Offering Registration Statement and Prospectus Supplement

51. On March 2, 2023, the SEC announced that it had settled charges against Chembio related to misstatements in the offering materials issued in connection with the May 2020 Offering.

52. Specifically, and as Lead Plaintiffs alleged in this case, the SEC accused Chembio of making material misrepresentations about the performance of the DPP COVID-19 Test in the

[6] As discussed below, Mr. Melnick also oversaw and helped the parties negotiate a fair and appropriate plan for allocating the Settlement funds among purchasers with Exchange Act claims and purchasers with Securities Act claims.

Registration Statement and Prospectus Supplement issued in connection with the Offering. According to the SEC, "Chembio falsely stated that its COVID-19 test was 100% accurate when used more than eleven days after the onset of symptoms," but that statement was false and misleading because it "was based on a subset of early performance data about the [T]est" that was "at odds with the results of a more recent independent evaluation as well as Chembio's ongoing internal analysis, which indicated that the test generated a notable rate of false negative results."

53. In settling the SEC's charges, Chembio agreed to a $500,000 civil monetary penalty. This penalty is more than sixteen times smaller than the $8.1 million payment Chembio is making to settle Lead Plaintiffs' claims here.

III. THE RISKS OF CONTINUED LITIGATION

54. The Settlement provides an immediate and certain benefit to the Class in the form of an $8.1 million cash payment and represents a very significant recovery, particularly after considering the real chance that if the Action continued, and Chembio's financial situation worsened and its available insurance reserves were depleted, the Class could have recovered much less or nothing at all. Moreover, as explained below, the Defendants had defenses with respect to liability, loss causation and damages in this case. Moreover, a significant portion of the case was dismissed, and a successful appeal could not be assured. Accordingly, there was a significant risk that, after years of protracted litigation, Lead Plaintiffs and the Class could achieve no recovery at all, or a lesser recovery than this Settlement.

A. Risks of Obtaining a Greater Recovery, or Any Recovery At All

55. Perhaps most pressing, there were very real risks to recovering a judgment larger than the Settlement Amount, or in any meaningful amount at all, in light of Chembio's poor financial condition and limited directors' and officers' liability insurance. Indeed, if Chembio's applicable insurance coverage was depleted – by, among other things, the defense costs associated

with this and other litigations – and the Company's financial condition further deteriorated, it would have likely reduced or eliminated the possibility of an equivalent recovery, or any recovery at all, for the Class regardless of the merits of the claims asserted in the Action and the success of any appeal. This was particularly true if the case proceeded into class, merits and expert discovery, where litigation defense costs would have substantially accelerated and depleted available insurance assets much more quickly.

56. Chembio was never a particularly liquid or well-capitalized company, and over the course of the litigation, Chembio's stock price, financial condition and liquidity deteriorated further, due in large part to the failure of the DPP COVID-19 Test (as alleged in the Complaint). For example, when the Funds filed their initial complaint in August 2020, Chembio's stock price was $5.24 per share and its market capitalization was $93 million. On December 28, 2022, when the parties executed the Stipulation, Chembio's stock price was $0.21 per share and its market capitalization was $6.3 million – nearly $2 million less than the Settlement Amount. Chembio is currently at risk for being delisted from NASDAQ because its stock price and market capitalization are too low.

57. Moreover, Chembio has issued a going concern warning, meaning (among other things) that there is doubt that the Company can meet its debt covenants and other obligations. At the end of 2022, the Company had cash and cash equivalents of $18.2 million, and an accumulated net deficit of $154.3 million. The Company used more than $10 million in cash in 2022 to fund its operations, and continues to burn cash at a prodigious rate.

58. Chembio's poor financial condition was, and remains, a very substantial risk had the litigation continued and progressed. The Company's ability to pay a larger settlement or

judgment, or to indemnify the Individual Defendants and the Underwriter Defendants for their own liability, was and remains severely constrained and in significant doubt.

B. Risks of Establishing Liability and Damages

59. Lead Plaintiffs and Lead Counsel believe that the claims asserted against the Chembio Defendants are meritorious and would be borne out if litigated to summary judgment or trial. Lead Plaintiffs and Lead Counsel acknowledge, however, that there would be substantial hurdles to establishing liability and damages.

60. For instance, the Court's MTD Order and order denying reconsideration dismissed with prejudice the Exchange Act claims. While Lead Plaintiffs retained an appeal right with respect to those claims, such an appeal could have only been taken at the conclusion of the case, after the Securities Act claims went to trial. This means any recovery related to the Exchange Act claims (assuming a successful appeal) would be many years in the future, if ever.

61. As to the Securities Act claims themselves, Defendants retained numerous defenses. For instance, Defendants were likely to argue that the misstatements and omissions that the Court found actionable at the motion to dismiss stage, including the omission of contrary data regarding the DPP COVID-19 Test's performance, were not actually false and misleading, and even if so, not material to Chembio's investors. In addition, Defendants would have raised numerous defenses to "standing," arguing (for instance) that Section 11's traceability requirement would have substantially limited recovery in connection with a secondary offering of stock.

62. Defendants would have also undoubtedly challenged loss causation through their "negative causation" affirmative defense to the Securities Act claims. Presumably, Defendants would have argued that numerous factors negatively impacted Chembio's stock price in 2020—not just the alleged misstatements and omissions. Defendants were likely to contend that there

were unrelated reasons, and not revelations regarding the DPP COVID-19 Test, which caused Chembio's stock price to decline after June 17, 2020. If this argument was successful at trial or before, it would have harmed Lead Plaintiffs' claims and substantially decreased the damages recoverable by the Class under the Securities Act.

63. Finally, the Underwriter Defendants possess a statutory "due diligence" defense whereby they could avoid liability altogether if they could demonstrate they did sufficient work to confirm the accuracy of the Registration Statement and still could not uncover the truth (if, for instance, it was concealed from the Underwriters by the Chembio Defendants). If that defense was successful at summary judgment or trial, Lead Plaintiffs' chances of a meaningful recovery (or any recovery at all) would have been greatly impeded.

64. In short, if the Court, or a jury, accepted any of these arguments, it would have undermined Lead Plaintiffs' chances to succeed on the merits of their claims, or substantially decreased the size of any recovery even if Lead Plaintiffs were able to demonstrate liability.

C. Other Risks

65. In addition to the risks discussed above, Lead Plaintiffs faced other significant risks including that: (i) discovery might not have supported some or all of Lead Plaintiffs' allegations; (ii) some or all of Lead Plaintiffs' experts, including experts on causation, damages, and antibody testing practices (among potential others) would have opinions that were excluded by the Court or not accepted by the jury; and (iii) the substantial risks of costs and delay if settlement were not achieved now. Finally, even if Lead Plaintiffs had succeeded in certifying a class or classes, overcame dispositive motions, proved all elements of their case at trial and obtained a jury verdict, the Defendants likely would have appealed. An appeal would not only have renewed all the risks

faced by Lead Plaintiffs, because Defendants would have re-asserted many of their arguments summarized above, but also would have led to additional delay.

66. For all these reasons, Lead Plaintiffs and Lead Counsel respectfully submit that the Settlement is fair, reasonable and adequate, and that it is in the best interests of the Class to accept the immediate and substantial benefit conferred by the Settlement, instead of incurring the significant risk that the Class might recover a lesser amount, or nothing at all, after protracted and arduous litigation.

IV. LEAD PLAINTIFFS' COMPLIANCE WITH THE COURT'S PRELIMINARY APPROVAL ORDER REQUIRING THE ISSUANCE OF NOTICE

67. The Court's Preliminary Approval Order directed that the Notice of Pendency and Proposed Settlement of Class Action (the "Notice") and Proof of Claim and Release form ("Claim Form") be disseminated to the Class.

68. The Preliminary Approval Order also set a May 15, 2023 deadline for Class Members to submit objections to the Settlement, the Plan of Allocation, and the Fee and Expense Application and award to Lead Plaintiffs, or to request exclusion from the Class, and set a final approval hearing date of June 5, 2023.

69. In accordance with the Preliminary Approval Order, Lead Counsel instructed Gilardi & Co. LLC ("Gilardi"), the Court-approved claims administrator, to begin disseminating copies of the Court-approved Notice and the Claim Form by mail and to publish the Summary Notice. The Notice contains, among other things: (i) a description of the Action and the Settlement; (ii) the terms of the proposed Plan of Allocation; (iii) an explanation of Class Members' right to participate in the Settlement; and (iv) an explanation of Class Members' rights to object to the Settlement, the Plan of Allocation, and the Fee and Expense Application and award to Lead Plaintiffs, or exclude themselves from the Class.

70. The Notice also informs Class Members of Lead Counsel's intent to apply for an award of attorneys' fees in an amount not to exceed 27.5% of the Settlement Fund, Litigation Expenses in an amount not to exceed $50,000, and an award to Lead Plaintiffs not to exceed $4,000. To disseminate the Notice, Gilardi obtained information from Chembio and from banks, brokers and other nominees regarding the names and addresses of potential Class Members. (*See* Declaration of Ross D. Murray Regarding Notice Dissemination, Publication, and Requests for Exclusion Received to Date ("Gilardi Decl."), submitted herewith, at ¶¶5-6.)

71. Beginning on February 23, 2023, and to date, Gilardi has disseminated 33,135 copies of the Notice and Claim Form (together, the "Notice Packet") to potential Class Members and their nominees by First-Class Mail. (*See* Gilardi Decl. at ¶¶5-11).

72. On March 2, 2023, in accordance with the Preliminary Approval Order, Gilardi caused the Summary Notice to be published in *The Wall Street Journal* and to be transmitted over *Business Wire*. (*See* Gilardi Decl. at ¶12).

73. Lead Counsel also caused Gilardi to establish a dedicated Settlement website, www.ChembioSecuritiesSettlement.com, to provide potential Class Members with information concerning the Action and the Settlement and access to downloadable copies of the Notice, Claim Form, Stipulation, and Preliminary Approval Order. (*See* Gilardi Decl. at ¶14). The website went live on February 23, 2023.

74. As noted above, the deadline for Class Members to file objections to the Settlement, the Plan of Allocation, and the Fee and Expense Application, or to request exclusion from the Class, is May 15, 2023. Although that date has not yet occurred, to date, no objections to the Settlement or Lead Counsel's application for attorneys' fees and expenses have been received; nor have any Class Members requested exclusion. (*See* Gilardi Decl. at ¶¶15-16). Lead Counsel will

file reply papers on May 26, 2023, after the deadline for submitting requests for exclusion and objections has passed, which will address any requests for exclusion and/or any objections that may be received.

V. ALLOCATION OF THE SETTLEMENT PROCEEDS

75. In accordance with the Court's Preliminary Approval Order and as explained in the Notice, each Class Member who wishes to participate in the distribution of the Settlement must submit a valid Claim Form with all required information postmarked or submitted online by no later than June 23, 2023. The net proceeds of the Settlement, along with any appreciation in capital of the Net Settlement Fund, will be distributed, *pro rata*, among Class Members who submit valid Claim Forms in accordance with a plan of allocation approved by the Court.

76. Lead Counsel developed the proposed Plan of Allocation in consultation with Lead Plaintiffs' damages expert, and with the assistance of the Mediator, as detailed below (*see infra* ¶¶75-83). Lead Counsel believes that the Plan of Allocation provides a fair and reasonable method to equitably allocate the Net Settlement Fund among Class Members who suffered losses as a result of the conduct alleged in the Complaint.

77. Lead Plaintiffs' proposed Plan of Allocation is set forth at ¶22 of the Notice. (*See* Notice (Gilardi Decl. Ex. A) at ¶ 22). As described in the Notice, calculations under the Plan of Allocation are not intended to be estimates, or indicative, of the amounts that Class Members might have been able to recover at trial or estimates of the amounts that will be paid to Authorized Claimants under the Settlement. Instead, the calculations under the plan are only a method to weigh the claims of Authorized Claimants against one another for the purpose of making an equitable allocation of the Net Settlement Fund. (*Id.* at ¶22.)

78. The Plan of Allocation recognizes that claims were asserted in the Action under both the Securities Act and the Exchange Act, and that not all Defendants are alleged to have

violated each Act. Moreover, there are material differences imposed by law on who can recover under each theory, and the showings necessary to recover under the two Acts are materially different. The Plan of Allocation recognizes these considerations and the requirements imposed by law as to who is eligible to recover under the different theories asserted in the Action. To that end, under the Plan of Allocation, the net proceeds of the Settlement will be divided into two separate funds as follows:

- Fund #1 (the Securities Act Fund): 62.84% of the Net Settlement Fund allocated to Securities Act Claims for all purchasers in the May Offering of Chembio common stock).
- Fund #2 (the Exchange Act Fund): 37.16% of the Net Settlement Fund allocated to Exchange Act Claims for all persons who purchased or acquired Chembio common stock on or between March 12, 2020 through and including June 16, 2020.

79. We believe that this proposed allocation, determined with the assistance of Lead Plaintiffs' and Lead Counsel's damages expert, is equitable and reasonable when certain factors are considered.

80. These factors include the size of each set of claims, both from an overall estimated damages perspective and based on the number of damaged Chembio shares entitled to recover under each theory. The damages available to the Exchange Act claims are larger – approximately $41.5 million as compared to $16.9 million for the Securities Act claims. Importantly, there are also a far greater number of shares entitled to recover against the Exchange Act Fund than the Securities Act Fund – approximately 15 million shares as compared to just 2.6 million shares (or more than five and a half times greater). This means that the Securities Act Fund of $5.09 million will be divided among just 2.6 million shares while the Exchange Act Fund of $3.01 million will be divided among 15 million shares, thereby increasing the relative recovery of Securities Act claimants. Before fees and expenses, the $5.09 million allocated to the Securities Act claimants

represents a recovery of 30% for those investors (based on Securities Act damages of $16.9 million), while the remaining $3.01 million allocated to the Exchange Act claimants represents a recovery of 7.25% for those investors (based on Exchange Act damages of $41.5 million).

81. In allocating the settlement proceeds in this manner, Lead Plaintiffs and Lead Counsel took into consideration the relative strength of the different claims. At the time the parties settled, the Court had dismissed the Exchange Act claims with prejudice and dismissed the Securities Act claims against the Chembio Defendants without prejudice, while sustaining those claims against the Underwriter Defendants. Thus, while Exchange Act claimants retained an appeal right with respect to those claims, and Lead Plaintiffs continued to believe in the ultimate merit of such claims, any appeal would have come only after the Securities Act claims were tried to a verdict. Lead Plaintiffs and Lead Counsel took into consideration the delayed and contingent nature of any recovery under the Exchange Act in allocating a meaningfully smaller percentage of the Net Settlement Fund to those claims – while at the same time taking into consideration the more than five times greater number of damaged shares for investors with Exchange Act claims, and the meaningfully greater total potential damages the Exchange Act claims represented.

82. Moreover, and as explained in more detail in the accompanying Melnick Declaration, Lead Counsel retained Mr. Melnick to assist with their analyses of and negotiations over the Plan of Allocation. As Mr. Melnick describes, Lead Counsel met with him in a half-day mediation session on September 22, 2022 to discuss a fair and appropriate plan for allocating the Settlement funds among purchasers with Exchange Act claims and purchasers with Securities Act claims. Lead Counsel – with the assistance of Mr. Melnick – continued to analyze the Plan of Allocation after that date. Ultimately, as Mr. Melnick describes, the process that led to the Plan of Allocation was conducted at arms'-length and with the assistance of a sophisticated and

independent neutral, and the proposed Allocation represents a reasonable and well-reasoned distribution of the settlement proceeds between and among differently situated Class members.

83. Under the Plan of Allocation, either Securities Act or Exchange Act Recognized Losses will be calculated for each purchase or other acquisition of Chembio securities during the Settlement Class Period that is listed in a Claim Form and for which adequate documentation is provided. For purchases during the Settlement Class Period that were in the May 2020 Offering, a Securities Act Recognized Loss amount will be calculated. (*See* Notice (Gilardi Decl. Ex. A) at ¶22). This Amount generally tracks the formula provided by Section 11(e) of the Securities Act. For Exchange Act claims, the Recognized Loss Amount will be the difference between the artificial inflation for that security on the date of purchase and the artificial inflation on the date of sale, or the difference between the actual purchase price and sales price of the security, whichever is less. (*See id.*).

84. In sum, the Plan of Allocation is designed to fairly and rationally allocate the proceeds of the Settlement among Class Members based on the relative strength of the claims asserted against the Defendants in the Action and the losses Class Members suffered on transactions in Chembio securities that were attributable to Defendants' alleged violations of the securities laws.

85. As noted above, as of April 21, 2023, 33,135 copies of the Notice, which contains the proposed Plan of Allocation and advises members of the Class of their right to object to the Plan, have been sent to potential Class Members and/or their nominees. (*See* Gilardi Decl. at ¶¶5-11). To date, Lead Plaintiffs have not received any objections to the Plan of Allocation.

86. Lead Plaintiffs and Lead Counsel respectfully submit that the Plan of Allocation is fair and reasonable and should be approved by the Court.

VI. THE FEE AND LITIGATION EXPENSE APPLICATION

87. In addition to seeking final approval of the Settlement and Plan of Allocation, Lead Counsel are applying to the Court for an award of attorneys' fees of 24% of the Settlement Fund, or $1,944,000 (the "Fee Application").[7] Lead Counsel also request an award of expenses of $16,339.68, to be paid from the Settlement Fund, that were incurred in connection with the prosecution of the Action, as well as an award to Lead Plaintiff MERS in the amount of $3,600 for the time it spent representing the Class. The legal authorities supporting the requested fee and expenses are discussed in Lead Counsel's Fee Memorandum. The primary factual bases for the requested fee and expenses are summarized below.

A. The Fee Application

88. For Lead Counsel's efforts on behalf of the Class, Lead Plaintiffs are applying for a fee award to be paid from the Settlement Fund on a percentage basis. As discussed in the accompanying Fee Memorandum, the percentage method is the appropriate method of fee recovery because it aligns the lawyers' interest in being paid a fair fee with the Class's interest in achieving the maximum recovery in the shortest amount of time necessary under the circumstances. The percentage method is recognized as appropriate by the Second Circuit for cases of this nature.

89. Based on the quality of the result achieved, the extent and quality of the work performed, the significant risks of the litigation, and the fully contingent nature of the representation, Lead Counsel respectfully submits that the requested fee award is reasonable and should be approved. As discussed in the Fee Memorandum, a 24% fee award is fair and reasonable

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[7] The 24% aggregate requested fee represents a blended fee of 27.5% of the $5.09 million allocation to investors with Securities Act claims and approximately 18% of the $3.01 million allocation to investors with Exchange Act claims.

for attorneys' fees in common-fund securities cases like this and is comfortably within the range of percentages awarded in this Circuit and elsewhere.

a) The Work of Lead Counsel

90. The Court-approved co-Lead Counsel are Rolnick Kramer Sadighi LLP and Robbins Geller Rudman & Dowd LLP. Submitted herewith are declarations by the undersigned, in support of an award of attorneys' fees and litigation expenses. Included within these supporting Declarations are schedules summarizing the hours and lodestar of each attorney and paraprofessional at RKS and Robbins Geller assigned to this Action, , firm resumes, and in respect to RKS, a summary of Litigation Expenses by category.

91. The lodestar amount for each attorney or paraprofessional was determined by multiplying the number of hours worked by each timekeeper by his or her present hourly rate. Personnel who billed less than five hours to the Action were excluded from the lodestar calculation. The time incurred administering the Settlement, if it is approved, has and will also be excluded.

92. Lead Counsel collectively spent 2,105.3 hours in the investigation, prosecution and settlement of the Action, for a total lodestar of $1,688,936.50. The requested fee of 24% of the Settlement Fund, or $1,944,000, represents a 1.15 multiplier of Lead Counsel's lodestar. As discussed in further detail in the Fee Memorandum, the requested multiplier is well within the range of fee multipliers typically awarded in comparable securities class actions and in other class actions involving significant contingency-fee risk, in the Second Circuit and elsewhere.

93. Throughout this case, Lead Counsel devoted substantial time to the prosecution of the Action. We maintained control of and monitored the work performed on this case. Attorneys and paraprofessionals at our firms undertook particular tasks appropriate for their levels of expertise, skill and experience. Throughout the prosecution of this Action, work assignments were

allocated among the attorneys at our firms in a manner that ensured efficiency and avoided unnecessary duplication of effort.

94. As demonstrated by Lead Counsel's firm resumes (attached as Exhibits to each of the Rolnick and Rosenfeld Declarations), RKS and Robbins Geller are among the most experienced and skilled law firms in the securities-litigation field, with a long and successful track record representing investors in complex securities fraud actions. Moreover, the substantial recovery achieved for the Class reflects the superior quality of Lead Counsel's representation.

b) The Risks of the Litigation and Need to Ensure the Availability of Skilled Counsel in High-Risk Securities Class Actions

95. This prosecution was undertaken by Lead Counsel entirely on a contingent-fee basis. The risks assumed by Lead Counsel in bringing these claims to a successful conclusion are described above, *see supra* ¶¶54-66. Those risks are also relevant to an award of attorneys' fees.

96. From the outset, Lead Counsel understood that they were undertaking a complex, expensive and lengthy litigation with no guarantee of ever being compensated for the substantial investment of time and money the Action would require. Lead Counsel was obligated to ensure that sufficient resources were dedicated to the prosecution of the Action, and that funds were available to compensate staff and to cover the considerable litigation costs that a complex securities action requires. Because cases such as this one normally take many years to conclude, the financial burden on contingent-fee counsel is far greater than on a firm that is paid on an ongoing basis. Indeed, Lead Counsel have received no compensation from this case during the course of the Action and have incurred significant expenses in prosecuting the Action for the benefit of the Class.

97. Lead Counsel know from experience that the commencement of a class action does not guarantee a settlement. To the contrary, it takes hard work and diligence by skilled counsel to

develop the facts and theories that are needed to sustain a complaint or win at trial, or indeed to induce sophisticated defendants to engage in serious settlement negotiations for substantial, multi-million dollar payments.

98. Lead Counsel also bore the risk that no recovery would be achieved. From the outset, this case presented multiple risks and uncertainties that could have prevented any recovery whatsoever. Despite vigorous efforts by competent counsel, success in contingent-fee litigation like this Action is never assured.

99. Furthermore, courts consistently recognize that it is in the public interest to have experienced and able counsel privately enforce the securities laws and regulations pertaining to the duties of officers and directors of public companies. As recognized by Congress through the passage of the PSLRA, vigorous private enforcement of the federal securities laws can only occur if private investors, particularly institutional investors, take an active role in protecting the interests of shareholders. If this important public policy is to be carried out, fees should adequately compensate plaintiffs' counsel, taking into account the risks undertaken in prosecuting a securities class action.

100. Lead Counsel's extensive and persistent efforts in the face of substantial risks and uncertainties outlined above resulted in a significant recovery for the benefit of the Class. In these circumstances, and in consideration of the hard work and the excellent result achieved, the requested fee is reasonable and should be approved.

c) The Reaction of the Class to the Fee Application

101. As noted above, as of April 21, 2023, a total of 33,135 Notice Packets have been mailed to potential Class Members and their nominees advising them that Lead Counsel would

apply for an award of attorneys' fees in an amount not to exceed 27.5% of the Settlement Fund. (*See* Gilardi Decl. ¶11.)

102. In addition, the Court-approved Summary Notice has been published in *The Wall Street Journal* and transmitted over *Business Wire*. (*Id.* ¶12.)

103. To date, no objection to the attorneys' fees set forth in the Notice has been received. Should any objections be received, they will be addressed in Lead Counsel's reply papers to be filed on May 26, 2023, after the deadline for submitting objections has passed.

104. In sum, Lead Counsel accepted this case on a contingency basis, committed significant resources to it, and prosecuted it without any compensation or guarantee of success. Based on the favorable result obtained, the quality of the work performed, the risks of the Action, and the contingent nature of the representation, Lead Counsel respectfully submit that a fee award of 24%, resulting in a slight lodestar multiplier of 1.15, is fair and reasonable, and is supported by the fee awards courts have granted in other comparable cases.

B. The Litigation Expense and Award to Lead Plaintiff Applications

105. RKS also seeks an award from the Settlement Fund of $16,339.68 in expenses that were reasonably and necessarily incurred in connection with commencing, litigating, and settling the claims asserted in the Action.[8] In addition Lead Plaintiff MERS seeks a $3,600 award for the time that it spent representing the Class.

106. From the beginning of the case, Lead Counsel were aware that they might not recover any of their expenses, and, even in the event of a recovery, would not recover any of their out-of-pocket expenditures until the Action was successfully resolved. Lead Counsel also

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[8] Robbins Geller is not seeking an award for its expenses in this Action, which will inure to the benefit of the Class.

understood that, even assuming that the case was ultimately successful, an award of expenses would not compensate them for the lost use of the funds advanced to prosecute the Action. Accordingly, Lead Counsel were motivated to and did take appropriate steps to avoid incurring unnecessary expenses and to minimize costs without compromising the vigorous and efficient prosecution of the case.

107. Lead Counsel maintained strict control over the expenses in this Action. RKS expenses are summarized in an exhibit to the Rolnick Declaration, which identifies each category of expense, as well as the amount incurred for each category. These expense items are billed separately by Lead Counsel and are not duplicated in Lead Counsel's billing rates.

108. Another large component of the expenses, $10,282.41, was for mediation fees charged by the Mediator and JAMS.

109. The other expenses for which Lead Counsel seeks an award are the types of expenses that are necessarily incurred in litigation and routinely charged to clients billed by the hour.

110. The Notice informed potential Class Members that Lead Counsel would seek an award of expenses in an amount not to exceed $50,000. The total amount requested, $16,339.68, is below the $50,000 that Class Members were advised could be sought. To date, no objection has been raised as to the maximum amount of expenses disclosed in the Notice. Lead Counsel will address any timely objections to the expense award request in Lead Counsel's May 26, 2023 reply papers.

111. The expenses incurred and advanced by RKS were reasonable and necessary to represent the Class and achieve the Settlement and should be awarded in full.

112. Lead Plaintiff MERS seeks approval of an award of $3,600 in time and expenses incurred in representing the Class. As set forth in the Declaration of Brian LaVictoire, Lead Plaintiff MERS took an active role in prosecuting the Action, including: (1) communicating with Lead Counsel on issues and developments in the Action; (2) reviewing documents filed in the case; (3) consulting with Lead Counsel on litigation and settlement strategy; and (4) reviewing and approving the proposed Settlement. *See* Declaration of Brian LaVictoire, ¶¶6-8. As such, Lead Plaintiff MERS respectfully requests that it be awarded $3,600 for the time that it spent working on behalf of the Class in the Action.

VII. CONCLUSION

113. For the reasons set forth above, Lead Plaintiffs and Lead Counsel respectfully submit that the Settlement and the Plan of Allocation should be approved as fair, reasonable and adequate. Lead Counsel further submit that the requested fee in the amount of 24% of the Settlement Fund should be approved as fair and reasonable, and the request for an award of total litigation expenses in the amount of $16,339.68, and an award to Lead Plaintiff MERS in the amount of $3,600, should also be approved.

Pursuant to 28 U.S.C. § 1746, we declare under penalty of perjury that the foregoing is true and correct.

DATED: April 24, 2023

s/ Lawrence M. Rolnick
Lawrence M. Rolnick

s/ David A. Rosenfeld
David A. Rosenfeld