IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

SPECIAL SITUATIONS FUND III QP, L.P. SPECIAL SITUATIONS CAYMAN FUND, L.P., and SPECIAL SITUATIONS PRIVATE EQUITY FUND, L.P., Individually and on Behalf of all Others Similarly Situated, Plaintiffs, v. CHEMBIO DIAGNOSTICS, INC., RICHARD L. EBERLY, GAIL S. PAGE, ROBERT W. BAIRD & CO. INC., and DOUGHERTY & COMPANY LLC, Defendants.	Case No.: 20-cv-03753 CLASS ACTION Related Cases: 20-cv-02758 and 20-cv-02961

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THE SPECIAL SITUATIONS FUNDS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR APPOINTMENT AS LEAD PLAINTIFF, APPROVAL OF SELECTION OF LEAD COUNSEL, AND CONSOLIDATION OF RELATED ACTIONS

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SERGEY CHERNYSH, Individually and on Behalf of all Others Similarly Situated,

Plaintiff,

v.

CHEMBIO DIAGNOSTICS, INC., RICHARD L. EBERLY, and GAIL S. PAGE,

Defendants.

Case No.: 2:20-cv-02706-ARR-ARL

CLASS ACTION

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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") (collectively the "Funds"), through their undersigned counsel, respectfully submit this memorandum law in support of their motion for: (1) appointment as Lead Plaintiffs in this proposed securities class action against Chembio Diagnostics, Inc. ("Chembio" or the "Company") pursuant to Section 27(a)(3)(B) of the Securities Act of 1933 (the "Securities Act"), 15 U.S.C. § 77z-1(a)(3)(B) and Section 21D(a)(3)(B) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78u-4(a)(3)(B), as amended by the Private Securities Litigation Reform Act of 1995 ("PSLRA"); (2) approval of the Funds' selection of Lowenstein Sandler LLP as Lead Counsel for the classes; and (3) consolidation of all related securities class actions pursuant to Rule 42(a) of the Federal Rules of Civil Procedure.

INTRODUCTION

The Funds, who have collectively lost more than $1.76 million on their investments in Chembio stock, filed a complaint against Chembio, as well as certain of the Company's directors and officers and its underwriters, on behalf two separate classes (collectively, the "Classes"): (1) under Sections 11, 12 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") (the "Section 11 Class"); and (2) under Sections 10(b) and 20(a) of the Exchange Act on behalf of all persons who purchased or otherwise acquired Chembio securities on the open market between April 1, 2020 and June 16, 2020, inclusive (the "Section 10(b) Class"). The Funds allege that Defendants callously took advantage of the

COVID-19 pandemic by falsely touting the effectiveness of the Company's COVID antibody test to inflate Chembio's stock price and dupe unsuspecting investors. When the truth was revealed and the FDA revoked the Company's authorization to sell the test, Chembio's stock price plummeted more than 60%.

Although three other putative class actions have been filed relating to Chembio, all of them were brought by individual shareholders with very small losses, and none of them seek to assert Section 11 claims on behalf of direct purchasers from the May Offering. Given their much larger losses and standing to assert claims on behalf of the Section 11 Class, the Funds should be appointed as Lead Plaintiffs for both Classes, and their selection of Lowenstein Sandler LLP as Lead Counsel for the Classes should be approved. All pending Chembio-related class actions should be consolidated.

Pursuant to the PSLRA, this Court must appoint the "most adequate plaintiff" to serve as Lead Plaintiff for the Class. 15 U.S.C. § 78u-4(a)(3)(B)(i). In selecting the "most adequate plaintiff," the Court is required to determine which movant has the "largest financial interest in the relief sought by the class" in this litigation, and whether such movant has made a *prima facie* showing that it is a typical and adequate class representative under Rule 23 of the Federal Rules of Civil Procedure. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). For the reasons set forth below, the Funds are the "most adequate plaintiff" by virtue of the more than $1.76 million they lost on their investments in 253,000 shares of Chembio common stock within the class definitions.[1] The Funds – private investment funds that manage hundreds of millions of dollars for investors – also satisfy the relevant requirements of Rule

[1] The Funds' PSLRA-required Certification is provided as Exhibit A to the Declaration of Lawrence M. Rolnick ("Rolnick Decl.") filed herewith. In addition, a chart setting forth calculations of the Funds' losses under both Section 11 and 10(b) measures is provided as Exhibit B to the Rolnick Decl.

23 because their claims are typical of all members of the Classes and because they will fairly and adequately represent each Class.

The Funds are paradigmatic Lead Plaintiffs under the PSLRA because they are sophisticated institutional investors with a real financial interest in the litigation, and also have experience serving as Lead Plaintiff in complex securities class actions and supervising the work of outside counsel. Further, the Funds fully understand the Lead Plaintiff's obligations to the Classes under the PSLRA given their prior experience, and are willing and able to undertake the responsibilities entailed in acting as Lead Plaintiffs to guarantee vigorous prosecution of this action. Moreover, the Funds have selected seasoned securities litigators at Lowenstein Sandler who have substantial experience in successfully prosecuting class and direct securities actions to serve as Lead Counsel for the Classes.

Accordingly, the Funds respectfully request that the Court appoint them Lead Plaintiffs and grant their motion in its entirety.

BACKGROUND AND SUMMARY OF PENDING ACTIONS

Chembio is a medical diagnostics company headquartered in Hauppauge, New York that provides point-of-care testing products to detect and diagnose infectious diseases. (Rolnick Decl. Ex. C (Class Action Complaint for the Violations of the Federal Securities Laws) ¶ 3.) Chembio owns proprietary testing technology called "Dual Path Platform" ("DPP"), which is a rapid diagnostic test that uses a drop of blood from the patient's fingertip to deliver a result within fifteen minutes. (*See id.*) In response to the COVID-19 pandemic, starting in February 2020 Chembio effectively changed its business to focus its DPP testing on the detection and diagnosis of COVID antibodies. (*Id.* ¶ 5.) The Company secured expedited regulatory approvals for its DPP antibody test from the U.S. Food and Drug Administration (a so-called "Emergency

Use Authorization" or "EUA"), along with other countries' regulators (*id.*), while touting the DPP's accuracy as "100%" for total antibodies. (*Id.* ¶ 6.) On the strength of this pivot and new business model, the Company undertook the May Offering of 2.338 million shares of common stock at $11.75 per share on or about May 7, 2020. (*Id.* ¶ 8.) The Offering was conducted pursuant to the Registration Statement, which was filed with the U.S. Securities and Exchange Commission ("SEC") on that same day.

The Funds purchased 125,000 shares directly out of the May Offering. (Rolnick Decl. Ex. A.) In addition, between April 1, 2020 and May 21, 2020 (inclusive), the Funds made net purchases of 128,000 shares of Chembio common stock on the open market. (*Id.*)

On June 16, 2020, the FDA shocked the market by disclosing in a press release that it was revoking Chembio's EUA due to "performance concerns with the accuracy of [Chembio's DPP] test," (Rolnick Decl. Ex. C (Compl.) ¶ 9), including because the performance of the DPP device "may be both inconsistent and lower than described" by CEMI publicly and directly to the FDA. As Chembio and the FDA have now revealed, the Company was aware of the problems with its antibody test no later than April, well before the May Offering, (*id.* ¶¶ 38-39), yet touted the unmatched accuracy of the test anyway to sell tens of millions of dollars of stock to the unwitting public on false pretenses. Immediately following the issuance of the press release and the FDA's revelations about the DPP antibody test, Chembio shares fell by at least $6.04 per share, a decline of more than 60%. (*Id.* ¶ 11.)

In the wake of this corrective disclosure, the Funds filed their Complaint in this Court seeking to recover damages for the Section 11 Class under the Securities Act, as well as for the Section 10(b) Class under the Exchange Act. (*See* Rolnick Decl. Ex. B.) The Funds lost $998,750.00 on their direct purchases of Chembio stock from the May Offering (using a Section

11 measure) and lost $769,140.00 on their purchases of Chembio stock in the open market (using a Section 10(b) measure). (*Id.*)

Three other putative class actions (the "Related Actions") have been filed in this District, each of which has been assigned to the Honorable Allyne R. Ross, U.S.D.J., and none of which allege claims, or have standing to allege claims, against the Defendants under the Securities Act.

Chernysh v. Chembio Diagnostics, Inc., No. 2:20-cv-02706-ARR-ARL. The *Chernysh* named plaintiff is an individual who purchased 1,000 shares of Chembio common stock on the open market in April 2020, before the May Offering, and seeks to represent a Section 10(b) class of all persons who purchased or otherwise acquired Chembio common stock between April 1, 2020 and June 16, 2020. He lost less than $10,000.

Gowen v. Chembio Diagnostics, Inc., No. 2:20-cv-02758-ARR-ARL. The *Gowen* named plaintiff is an individual who purchased approximately 67,000 shares of Chembio common stock on the open market in March and April 2020, before the May Offering and, in many cases, at prices below $3.89 per share, the price of the Company's stock following the corrective disclosure. *Gowen* seeks to represent a Section 10(b) class of all persons who purchased or otherwise acquired Chembio common stock between March 12, 2020 and June 16, 2020. He lost less than $10,000 on his alleged purchases, when measured using the purchase price of his shares and the closing price of Chembio stock immediately following the curative disclosure.

Bailey v. Chembio Diagnostics, Inc., No. 2:20-cv-02961-ARR-ARL. The *Bailey* named plaintiff is an individual who purchased 475 shares of Chembio common stock on the open market in April 2020, before the May Offering, and seeks to represent a Section 10(b) class of all persons who purchased or otherwise acquired Chembio common stock between April 1, 2020 and June 16, 2020. The named plaintiff lost less than $5,000.

ARGUMENT

The PSLRA governs the selection of Lead Plaintiff in class actions brought under the Securities Act and the Exchange Act. *See* 15 U.S.C. § 78u-4.[2] Under the PSLRA, any Class member may move for appointment as Lead Plaintiff within 60 days of the publication of notice that the first action asserting substantially the same claims has been filed. *See* 15 U.S.C. § 78u-4(a)(3)(A). The *Chernsyh* plaintiff filed the first complaint on June 18, 2020. That same day, Kaplan Fox & Kilsheimer LLP, counsel for *Chernysh*, published notice in *Globe Newswire* apprising investors of the pendency of the *Chernysh* action and of their right to seek lead plaintiff status within 60 days. (Rolnick Decl. Ex. D.) The Funds satisfied the statutory deadline by filing this Motion on August 17, 2020.

I. The Funds Should be Appointed Lead Plaintiffs

A. The Funds Have the Largest Financial Interest in the Relief Sought by the Classes

The Funds should be appointed Lead Plaintiff because they have the "largest financial interest in the relief sought by the class." 15 U.S.C. § 78u4(a)(3)(B)(iii)(I)(bb). In making this determination, courts in the Second Circuit analyze the four "*Lax*" factors: "(1) the number of shares purchased; (2) the number of net shares purchased; (3) total net funds expended by the plaintiffs during the class period; and (4) the approximate losses suffered by the plaintiffs." *In re CMED Sec. Litig.*, No. 11-cv-9297, 2012 WL, at *3 (S.D.N.Y. Apr. 2, 2012) (citing *Lax v. First Merchants Acceptance Corp.*, No. 97-cv-2715, 1997 WL 461036, at *5 (N.D. Ill. Aug. 11, 1997)). The most important of the four factors is putative lead plaintiff's "approximate loss." *See id.*

[2] Because the relevant provisions of the Securities Act and Exchange Act versions of the PSLRA are substantively identical, we cite to the Exchange Act for convenience.

The Funds are the presumptive lead plaintiffs under any measure. As demonstrated herein, the Funds purchased 253,000 class period shares of Chembio and sustained total losses of $1.76 million from their transactions in Chembio stock within the two Class definitions: $998,000 in losses on their purchases of stock directly in the May Offering, and more than $769,000 on their open market purchases of Chembio stock. (*See* Rolnick Decl. Ex. B.) None of the plaintiffs who filed the other three Chembio-related class actions in this District suffered anywhere near this amount of economic loss, and to the best of the Funds' knowledge, there is no other applicant seeking Lead Plaintiff appointment that has a larger financial interest in the litigation (or one that is even close).

Accordingly, the Funds have the largest financial interest in both Classes of any qualified movant seeking Lead Plaintiff status, and are the presumptive most adequate plaintiffs for both Classes. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii).

B. The Funds Satisfy the Relevant Rule 23 Requirements

In addition to possessing the largest known financial interest in the outcome of this litigation, the Funds also satisfy the typicality and adequacy requirements of Rule 23. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(cc). At this stage, the Court should rely on the presumptive lead plaintiff's complaint and sworn certification, and the Funds need only make a "preliminary showing that the adequacy and typicality requirements [of Rule 23] have been met. *See, e.g.*, *Hom v. Vale, S.A.*, No. 16-cv-658, 2016 WL 880201, at *6 (S.D.N.Y. Mar. 7, 2016); *see also Lopez v. CTPartners Exec. Search Inc.*, No. 15-cv-1476, 2015 WL 2431484, at *2 (S.D.N.Y. May 18, 2015) (explaining that "only" the "typicality and adequacy factors – are pertinent" (quotation and marks omitted)). Here, the Funds comfortably satisfy both requirements.

The Funds' claims are typical of the claims of the other purchasers of Chembio securities. "A lead plaintiff's claims are typical where 'each class member's claim arises from the same

course of events, and each class member makes similar legal arguments to prove the defendant's liability.'" *Lopez*, 2015 WL 2431484, at *2 (quotation omitted). Here, with respect to both Classes, the Funds and all other Class members' claims arise from substantially the same course of conduct, and their legal arguments to prove Defendants' liability are substantially the same. Like all other Class members in the Section 11 Class, the Funds: (1) purchased Chembio common stock directly in the May Offering pursuant to the false and misleading Registration Statement; and (2) were damaged thereby. Similarly, like all other Class members in the Section 10(b) Class, the Funds: (1) purchased Chembio securities during the Class Period on the open market; (2) at prices artificially inflated by Defendants' false and misleading statements or omissions; and (3) were damaged thereby. (*See* Rolnick Decl. Exs. A & B.) Consequently, the Funds are typical Class representatives for both Classes.

The Funds likewise satisfy Rule 23's adequacy requirement. Under Rule 23(a)(4), the representative party must "fairly and adequately protect the interests of the Class." Fed. R. Civ. P. 23(a)(4). A class representative is adequate for purposes of the lead plaintiff inquiry where it shows that "(1) class counsel is qualified, experienced, and generally able to conduct the litigation; (2) there is no conflict between the proposed lead plaintiff and the members of the class; and (3) the proposed lead plaintiff has a sufficient interest in the outcome of the case to ensure vigorous advocacy." *Vale*, 2016 WL 880201, at *6. The Funds satisfy these elements because their substantial financial stake in the outcome of both Classes' claims provides the ability and incentive to vigorously prosecute the litigation, and because the Funds' interests are perfectly aligned with those of other Class members and are not antagonistic in any way. (Rolnick Decl. Ex. E (Greenhouse Declaration in Support of Motion for Lead Plaintiff and Approval of Selection of Lead Counsel).) The Funds are "well-grounded and sophisticated

institutional investor[s] that can commit substantial resources to this litigation." *Ohio Pub. Emps. Ret. Sys. v. Fannie Mae*, 357 F. Supp. 2d 1027, 1035 (S.D. Ohio 2005). Indeed, David Greenhouse, a high ranking executive of the investment advisor and general partners of each of the Funds, submitted Declarations affirming the Funds' understanding and acceptance, if appointed Lead Plaintiffs in this action, of the duties and responsibilities owed to other class members as a representative party to supervise counsel and monitor the prosecution of this action in the best interests of the Classes. (Rolnick Decl. Exs. A, E.)

Further, based on the past experience of serving as Lead Plaintiff, the Funds are well aware of Lead Plaintiff's obligations under the PSLRA to oversee and supervise the litigation separate and apart from counsel. The Funds have significant experience serving as Lead Plaintiffs under the PSLRA and have achieved a significant recovery for investors in two previous matters. *See Special Situations Fund III QP, L.P. v. Marrone Bio Innovations, Inc.*, Case No. 14-cv-2571-MCE (E.D. Cal.) (England, J.); *Special Situations Fund III, L.P. v. Quovadx, Inc.*, Civil Action No. 04-1006 (D. Colo.) (Matsch, J.)

In the *Marrone Bio* matter, Fund III and Cayman Fund both served as co-lead plaintiffs in a complex securities class action asserting claims under Sections 11 and 10(b) against Marrone Bio Innovations, a bio-based pesticides company that duped its investors through years of falsified sales (and whose Chief Operating Officer ("COO") was criminally prosecuted). The Funds also prosecuted claims against Marrone's directors and officers – including the COO – and the company's auditors at Ernst & Young. Fund III QP and Cayman Fund were represented by the same attorneys at Lowenstein Sandler that they are seeking to represent them here, including Lawrence M. Rolnick, Steven M. Hecht, and Brandon Fierro. The Funds recovered on behalf of the class an eight-figure settlement against Marrone Bio and its

executives, and another substantial settlement against Marrone Bio's auditor. (*See* Rolnick Decl. Ex. G.)

In the *Quovadx* matter, Cayman Fund and other Special Situations funds served as lead plaintiffs, represented again by Lawrence M. Rolnick and Lowenstein Sandler as lead counsel, in a securities class action against Quovadx, Inc. ("Quovadx"). Cayman Fund obtained on behalf of the class partial summary judgment against Quovadx on liability, and achieved a multi-million dollar settlement that resulted in a recovery of more than 85% of losses for the class members asserting claims under Section 11 of the Securities Act. (Rolnick Decl. Ex. F.)

The Funds are also the very sort of Lead Plaintiff envisioned by Congress when it enacted the PSLRA – sophisticated institutional investors with a substantial interest in the litigation. *See* H.R. Conf. Rep. No. 104-369, at *34 (1995), reprinted in 1995 U.S.C.C.A.N. 730, 733 (1995) (explaining that "increasing the role of institutional investors in class actions will ultimately benefit shareholders and assist courts by improving the quality of representation in securities class actions"); *Glauser v. EVCI Career Colls. Holding Corp.*, 236 F.R.D. 184, 188 (S.D.N.Y. 2006) (noting that "the PSLRA was passed, at least in part, to increase the likelihood that institutional investors would serve as lead plaintiffs in [securities class] actions"); *Steiner v. Frankino*, No. 1:98-cv-264, 1998 WL 34309018, at *4 (N.D. Ohio July 16, 1998) ("In enacting the PSLRA, Congress . . . wanted to vest control [of securities litigation] with large investors.").

Finally, the Funds have demonstrated their adequacy through their selection of the securities litigators at Lowenstein Sandler LLP, including Lawrence M. Rolnick, Marc B. Kramer, Steven M. Hecht, Brandon Fierro, and Jennifer A. Randolph as Lead Counsel to represent the Classes in this action. As discussed more fully below, these counsel are highly

qualified and experienced in the area of securities class action litigation and have repeatedly demonstrated an ability to conduct such litigation effectively.

II. The Court Should Approve the Funds' Selection of Lead Counsel

The Court should approve the Funds' selection of the securities litigators at Lowenstein Sandler LLP to serve as Lead Counsel on behalf of the Classes. Pursuant to 15 U.S.C. § 78u-4(a)(3)(B)(v), a movant shall, subject to court approval, select and retain counsel to represent the class they seek to represent, and the Court should not disturb Lead Plaintiff's choice of counsel unless it is necessary to "protect the interests of the class." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II)(aa); *see also Cohen v. United States Dist. Ct. for the N. Dist. of California*, 586 F.3d 703, 709 (9th Cir. 2009) ("It would be difficult for the statute to be more clear that it is the lead plaintiff who selects lead counsel, not the district court.").

Lowenstein Sandler's securities litigators (the "Securities Litigation Group"), including the attorneys specifically retained to represent the Funds in this matter – Lawrence M. Rolnick, Marc B. Kramer, Steven M. Hecht, Brandon Fierro, and Jennifer A. Randolph – handle cases across the country on behalf of both plaintiffs and defendants, including hedge funds; registered investment advisers; private equity and investment funds; and other institutional and private investors. (*See* Rolnick Decl. Ex. H (counsel and firm biographies).) In addition to the *Marrone Bio* and *Quovadx* class actions described above, the Securities Litigation Group routinely represents sophisticated institutional investors like the Funds in direct actions to prosecute multi-million dollar claims under the Securities Act and Exchange Act.

Lowenstein Sandler and attorneys from the Securities Litigation Group have alos previously served as lead counsel or co-lead counsel in other notable, large, complex securities class action lawsuits and achieved exceptional results (*see* Rolnick Decl. ¶¶ 6-9):

- *In re Nortel Networks Corp. Sec. Litig.*, Civil Action No. 05-MD-1659 (S.D.N.Y.) (Nortel II) (Preska, J.) – Lowenstein Sandler and Bernstein Litowitz served as lead counsel, representing New Jersey and another co-lead plaintiff, in this securities fraud class action in the Southern District of New York. In December 2006, the case was settled for $1.3 billion, one of the largest settlements since the inception of the PSLRA.

- *In re Elec. Data Sys. Corp. Sec. Litig.*, Civil Action No. 6:03-MD-1512 (E.D. Tex.) (Davis, J.) – Lowenstein Sandler and Bernstein Litowitz served as co-lead counsel representing New Jersey in this securities fraud class action filed in the Eastern District of Texas. In 2006, the case was settled for $137.5 million, one of the largest settlements ever against a corporation that had not issued a restatement for the relevant class period.

- *In re SFBC Int'l, Inc., Sec. & Derivative Litig,*. Civil Action No. 2:06-165 (D.N.J.) (Chesler, J.) – Lowenstein Sandler, along with Bernstein Litowitz, represented an Arkansas public pension fund in a plaintiffs' securities class action asserting Section 10(b)/Rule 10b-5 claims against a company and its officers for misleading statements and omissions regarding the operations of a clinical testing facility. The matter resulted in a multi-million dollar settlement for the class.

- *The Department of the Treasury of the State of New Jersey and Its Division of Investment v. Cliffs Natural Resources*, Case No. 14-cv-1031-DAP (N.D. Ohio) (Polster, J.) – Lowenstein Sandler and Bernstein Litowitz represented the State of New Jersey in this securities fraud class action in the Northern District of Ohio, alleging that a mining company and its executives made numerous false and misleading statements about a failed mine acquisition that crippled its business. The matter is resulted in an $84 million settlement for the class.

The Funds have been advised that the Securities Litigation Group is forming a new firm, Rolnick Kramer and Sadighi LLP ("RKS"), effective September 1, 2020, and departing Lowenstein Sandler. It is the Funds' intent at that time, or as soon thereafter as is practicable, to substitute in RKS for Lowenstein Sandler as Lead Counsel for the Classes. The Funds retained Lowenstein Sandler specifically because of their past experience with the attorneys comprising the Securities Litigation Group, including Messrs. Rolnick, Kramer, Hecht and Fierro, with whom the Funds worked to achieve excellent results for the classes in *Marrone Bio* and *Quovadx*. Given that the individual attorneys responsible for prosecuting this case on behalf of

the Classes will not change once RKS is substituted in for Lowenstein Sandler, the Funds are confident that the Classes will continue to receive the same level of vigorous and high caliber representation as would have been the case if Lowenstein Sandler remained counsel. (*See* Rolnick Decl. Ex. E (Greenhouse Declaration in Support of Motion for Appointment of Lead Plaintiff and Approval of Selection of Lead Counsel) ¶¶ 5-6.)

Ultimately, the Funds believe the experience of the attorneys in the Securities Litigation Group, whether practicing at Lowenstein Sandler or RKS, combined with our oversight of counsel pursuant to the PSLRA, will ensure that the classes receive the best possible representation in this case.

III. The Related Actions Should be Consolidated

Under the PSLRA, the Court is required to hear motions to consolidate prior to appointing Lead Plaintiff. 15 U.S.C. § 78u-4(a)(3)(B)). The Court has broad discretion under Rule 42(a) "to consolidate actions involving 'common questions of law or fact.'" *Id*. (quoting Fed. R. Civ. P. 42(a)). As described above, to the Funds' knowledge and counting their own suit, there are four related securities class actions filed in this District against Chembio and various other defendants, which are currently pending before this Court. Although not identical, all these actions have overlapping class periods and present common factual and legal issues concerning Defendants' liability to Chembio's investors for false and misleading statements under the federal securities laws concerning the DPP COVID-19 antibody test. Accordingly, consolidation of all four actions under Rule 42(a) is appropriate because it will promote judicial economy and convenience, and avoid unnecessary costs to and burdens on the parties. *In re Bank of Am. Corp. Secs., Deriv. and ERISA Litig.*, 258 F.R.D. 260, 267-68 (S.D.N.Y. 2009) (concluding that consolidation was appropriate where there were sufficiently common questions of law and fact, even in light of differences in defendants, causes of action, and class periods).

CONCLUSION

For the foregoing reasons, the Funds respectfully request that the Court issue an order: (1) consolidating the above-captioned actions and the related actions; (2) appointing the Funds as Lead Plaintiff; (3) approving the Securities Litigation Group at Lowenstein Sandler as Lead Counsel for the Classes; and (4) granting such other relief as the Court may deem to be just and proper.

DATED: August 17, 2020

Respectfully submitted,

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