UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SERGEY CHERNYSH, on Behalf of Himself and All Others Similarly Situated, Plaintiff, vs. CHEMBIO DIAGNOSTICS, INC., RICHARD L. EBERLY and GAIL S. PAGE, Defendants.	Civil Action No. 2:20-cv-02706-ARR-ARL CLASS ACTION
JAMES GOWEN, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. CHEMBIO DIAGNOSTICS, INC., RICHARD L. EBERLY and GAIL S. PAGE, Defendants.	Civil Action No. 2:20-cv-02758-ARR-ARL CLASS ACTION
ANTHONY BAILEY, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. CHEMBIO DIAGNOSTICS, INC., RICHARD L. EBERLY, GAIL S. PAGE and NEIL A. GOLDMAN, Defendants.	Civil Action No. 2:20-cv-02961-ARR-ARL CLASS ACTION

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

I. INTRODUCTION

Presently pending in this District are three related securities class action lawsuits (the "Related Actions") on behalf of purchasers of Chembio Diagnostics, Inc. ("Chembio" or the "Company") securities between March 12, 2020 and June 16, 2020 (the "Class Period"), against Chembio and three of its executives, alleging violations of the Securities Exchange Act of 1934 ("1934 Act").[1] The Private Securities Litigation Reform Act of 1995 ("PSLRA") requires district courts to resolve consolidation before appointing a lead plaintiff in securities cases. *See* 15 U.S.C. §78u-4(a)(3)(B)(ii). Here, the Related Actions should be consolidated because each asserts the same 1934 Act claims against nearly identical defendants during overlapping class periods. *See* Fed. R. Civ. P. 42(a).

As soon as practicable after its decision on consolidation, the Court "shall appoint the most adequate plaintiff as lead plaintiff for the consolidated actions." 15 U.S.C. §78u-4(a)(3)(B)(ii). The lead plaintiff is the member "of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members." 15 U.S.C. §78u-4(a)(3)(B)(i). Here, Municipal Employees' Retirement System of Michigan ("MERS") should be appointed as lead plaintiff because it: (1) timely filed this motion; (2) has a substantial financial interest in the outcome of this litigation; and (3) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure. *See* 15 U.S.C. §78u-4(a)(3)(B)(iii). In addition, the Court should approve MERS' selection of Robbins Geller Rudman & Dowd LLP as lead counsel for the class. *See* 15 U.S.C. §78u-4(a)(3)(B)(v).

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[1] The Related Actions are *Chernysh v. Chembio Diagnostics, Inc.*, No. 2:20-cv-02706 (E.D.N.Y.), *Gowen v. Chembio Diagnostics, Inc.*, No. 2:20-cv-02758 (E.D.N.Y.), and *Bailey v. Chembio Diagnostics, Inc.*, No. 2:20-cv-02961 (E.D.N.Y.). All emphasis is added and all citations are omitted unless otherwise noted.

II. FACTUAL BACKGROUND

The Related Actions allege that defendants concealed the efficacy of Chembio's Dual Path Platform ("DPP") diagnostic test for the detection of COVID-19 and IgM and IgG antibodies. In March 2020, Chembio entered into a strategic partnership with LumiraDx Limited, a company focused on developing, manufacturing, and commercializing industry-leading point-of-care diagnostic platforms, with the aim of developing a diagnostic test for the detection of the COVID-19 virus and IgM and IgG antibodies. Chembio emphasized that its antibody test provided high sensitivity and specificity, and was 100% accurate, which encouraged some entities to place millions of dollars' worth of purchase orders for Chembio's DPP COVID-19 tests. As a result of these positive statements, the price of Chembio stock climbed from a close of $5.12 per share on March 31, 2020 to a Class Period high of more than $15 per share on April 24, 2020.

On May 11, 2020, defendants took advantage of the artificially inflated price of Chembio common stock, closing a public offering of 2.6 million shares at $11.75 per share for gross proceeds of approximately $30.8 million.

On June 16, 2020, after the market closed, the U.S. Food and Drug Administration ("FDA") issued a public announcement disclosing that it had revoked Chembio's Emergency Use Authorization ("EUA") for its DPP COVID-19 test "due to performance concerns with the accuracy of the test." ECF No. 1 at ¶8. Specifically, the FDA explained that the Company's DPP COVID-19 test "generate[d] a higher than expected rate of false results and higher than that reflected in the authorized labeling for the device." *Id.* As a result, the FDA concluded that the "'test's benefits no longer outweigh its risks.'" *Id.* A subsequent Department of Health and Human Services evaluation report found the test's positive predictive value was under 19%. The following day, Chembio filed a Form 8-K with the U.S. Securities and Exchange Commission ("SEC") acknowledging the receipt of

the FDA's June 16, 2020 letter disclosing the FDA's revocation of its EUA. Immediately following the disclosure of the FDA's letter, at least five analysts downgraded Chembio stock. As a result of these disclosures, the price of Chembio stock suffered a single-day decline of approximately 60%, damaging investors.

III. ARGUMENT

A. The Related Actions Should Be Consolidated

The PSLRA requires the Court to consolidate the Related Actions before appointing a lead plaintiff. *See* 15 U.S.C. §78u-4(a)(3)(B)(ii). Consolidation pursuant to Rule 42(a) is proper when actions involve common legal and factual questions. Fed. R. Civ. P. 42(a). "Absent prejudice to the defendants, '[c]onsolidation of multiple actions alleging securities fraud is appropriate where those actions relate to the same public statements and reports,'" and "'the actions need not be identical to allow for consolidation.'" *Rauch v. Vale S.A.*, 378 F. Supp. 3d 198, 204 (E.D.N.Y. 2019). "In fact, '[d]ifferences in causes of action, defendants, or the class period do not render consolidation inappropriate if the cases present sufficiently common questions of fact and law, and the differences do not outweigh the interests of judicial economy served by consolidation.'" *Id.*

The Related Actions here share sufficiently common legal and factual questions to warrant consolidation. Given that all three actions involve the same company and nearly identical defendants, and nearly the same facts, claims, and legal theories, consolidation will prevent needless duplication and possible confusion, as well as potentially inconsistent jury verdicts.[2] There is also little or no risk of prejudice to the parties from consolidation. Because these Related Actions are

[2] The *Gowen* action alleges a slightly longer class period than alleged in *Chernysh* and *Bailey*, and *Bailey* names one more defendant than are named in *Chernysh* and *Gowen*. These differences will be resolved upon the filing of a consolidated complaint.

based on the same facts and legal issues, the same discovery will pertain to both lawsuits. Thus, consolidation is appropriate here.

B. MERS Should Be Appointed Lead Plaintiff

The PSLRA establishes the procedure for the appointment of a lead plaintiff in "each private action arising under [the 1934 Act] that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure." 15 U.S.C. §78u-4(a)(1); *see also* 15 U.S.C. §78u-4(a)(3)(B)(i). First, the pendency of the action must be publicized in a widely circulated national business-oriented publication or wire service not later than 20 days after filing of the first complaint. *See* 15 U.S.C. §78u-4(a)(3)(A)(i). Next, the PSLRA provides that the Court shall adopt a presumption that the most adequate plaintiff is the person that:

> (aa) has either filed the complaint or made a motion in response to a notice . . .;
>
> (bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and
>
> (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

15 U.S.C. §78u-4(a)(3)(B)(iii). MERS meets each of these requirements and should therefore be appointed Lead Plaintiff.

1. MERS' Motion Is Timely

On June 18, 2020, the statutory notice for this action was published on *Globe Newswire*, which advised class members of the pendency of the action, the alleged claims, its class definition, and the option of moving the Court to be appointed as lead plaintiff within 60 days, or by August 17, 2020. *See* Declaration of David A. Rosenfeld in Support of Motion for Consolidation of Related Actions, Appointment as Lead Plaintiff, and Approval of Lead Plaintiff's Selection of Lead Counsel ("Rosenfeld Decl."), Ex. A. Because MERS' motion was timely filed by the statutory deadline, it is eligible for appointment as lead plaintiff.

2. MERS Possesses a Large Financial Interest

As indicated in its Certification and loss chart, MERS purchased 155,394 shares of Chembio stock during the Class Period and suffered approximately $631,781 in losses as a result of defendants' alleged wrongdoing. *See* Rosenfeld Decl., Exs. B, C. To the best of its counsel's knowledge, there are no other plaintiffs with a larger financial interest.

3. MERS Otherwise Satisfies Rule 23

In addition to possessing a significant financial interest, a lead plaintiff must also "otherwise satisf[y] the requirements of Rule 23." 15 U.S.C. §78u-4(a)(3)(B)(iii)(I)(cc). "In a PSLRA motion to appoint lead plaintiff, the Court considers only whether the proposed plaintiff has made a 'preliminary showing' that two of Rule 23's requirements – typicality and adequacy –are satisfied." *Rauch*, 378 F. Supp. 3d at 209. "'Typicality is satisfied where the claims arise from the same course of events and each class member makes similar legal arguments to prove defendant's liability.'" *Id.* "In analyzing the adequacy requirement in the context of appointing lead plaintiff, courts consider: '(1) whether the proposed class counsel is qualified, experienced, and generally able to conduct the litigation; (2) whether the proposed lead plaintiff has interests that are antagonistic to other class members; and (3) whether the proposed lead plaintiff and the class possess sufficient interest to pursue vigorous prosecution of their claims.'" *Id.* at 210.

Here, as MERS' Certification and loss chart evidence, MERS purchased Chembio stock during the class period and suffered harm when defendants' alleged misconduct was revealed. *See* Rosenfeld Decl., Exs. B, C. MERS' substantial stake in the outcome of the case indicates that it has the requisite incentive to vigorously represent the class's claims. MERS is not aware of any conflicts between its claims and those asserted on behalf of the putative class and is not subject to any unique defenses.

MERS administers the retirement plans for Michigan's local units of government on a not-for-profit basis. *See* https://www.mersofmich.com (last visited Aug. 17, 2020). MERS has approximately $12 billion in assets under management overseen by an elected board for the benefit of more than 100,000 participants. MERS has prior experience serving as lead plaintiff in securities cases and is familiar with overseeing counsel.

MERS' common interests shared with the class, substantial financial interest in the litigation, and selection of qualified counsel (discussed below) confirm its satisfaction of the Rule 23 requirements.

C. MERS' Selection of Counsel Should Be Approved

Pursuant to the PSLRA, the proposed lead plaintiff shall, subject to Court approval, select and retain counsel to represent the class it seeks to represent. *See* 15 U.S.C. §78u-4(a)(3)(B)(v). Here, MERS has selected Robbins Geller to serve as lead counsel for the proposed class.[3]

Robbins Geller, a 200-attorney nationwide law firm with offices in New York, regularly practices complex securities litigation. The Firm's securities department includes numerous trial attorneys and many former federal and state prosecutors, and utilizes an extensive group of in-house experts to aid in the prosecution of complex securities issues. Courts throughout the country, including within this District, have noted Robbins Geller's reputation for excellence, which has resulted in the appointment of Robbins Geller attorneys to lead roles in hundreds of complex class action securities cases. *See, e.g.*, *Batwara v. Infosys Ltd.*, No. 1:19-cv-05959, ECF No. 20 (E.D.N.Y. Jan. 13, 2020) (appointing Robbins Geller as lead counsel in securities case); *see also In re Am. Realty Capital Props., Inc. Litig.*, No. 1:15-mc-00040-AKH, ECF No. 1316 at 55 (S.D.N.Y. Jan. 21,

[3] For a detailed description of Robbins Geller's track record, resources, and attorneys, please see https://www.rgrdlaw.com. A hard copy of the Firm's resume is available upon the Court's request, if preferred.

2020) (concerning Robbins Geller's role as lead counsel in recovering $1.025 billion for the class in a securities case, stating "the role of lead counsel was fulfilled in an extremely fine fashion by [Robbins Geller]. At every juncture, the representations made to me were reliable, the arguments were cogent, and the representation of their client was zealous."); *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, No. 1:08-cv-10783, ECF No. 243 at 10-11 (S.D.N.Y. May 2, 2016) (concerning Robbins Geller's role as lead counsel in recovering $272 million for the class of MBS purchasers, stating: "Counsel, thank you for your papers. They were, by the way, extraordinary papers in support of the settlement," and acknowledging "plaintiffs' counsel's success in the Second Circuit essentially changing the law. I will also note what counsel have said, and that is that this case illustrates the proper functioning of the statute . . . . Counsel, you can all be proud of what you've done for your clients. You've done an extraordinarily good job.").

Notably, in the first few months of 2020 alone, Robbins Geller has recovered more than $2.5 billion on behalf of investors in securities class action cases, including $1.02 billion in *Am. Realty*, $1.21 billion in *In re Valeant Pharm. Int'l, Inc. Sec. Litig.*, No. 3:15-cv-07658-MAS-LHG (D.N.J.) (pending final approval), and $350 million in *Smilovits v. First Solar, Inc.*, No. 2:12-cv-00555-DGC (D. Ariz.). Robbins Geller has also obtained the largest securities fraud class action recoveries in the Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits, as well as a 2019 PSLRA class action trial victory in *HsingChing Hsu v. Puma Biotechnology, Inc.*, No. 8:15-cv-00865-AG (C.D. Cal.), where the jury returned a verdict for plaintiff, finding that defendants Puma Biotechnology, Inc. and its CEO committed securities fraud.[4]

[4] *See In re Enron Corp. Sec. Litig.*, No. 4:01-cv-03624 (S.D. Tex.) ($7.3 billion recovery is largest securities class action recovery in U.S. history and in the Fifth Circuit); *In re Cardinal Health, Inc. Sec. Litig.*, No. 2:04-cv-00575-ALM (S.D. Ohio) ($600 million recovery is the largest securities class action recovery in the Sixth Circuit); *Lawrence E. Jaffe Pension Plan v. Household Int'l Inc.*, No. 1:02-cv-05893 (N.D. Ill.) ($1.575 billion recovery is the largest securities class action

MERS' selection of Robbins Geller as proposed lead counsel is reasonable and should be approved.

IV. CONCLUSION

The Related Actions share common legal and factual questions and should be consolidated. In addition, MERS has satisfied each of the PSLRA's requirements for appointment as lead plaintiff. As such, MERS respectfully requests that the Court grant its motion.

DATED: August 17, 2020

Respectfully submitted,

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recovery ever following a trial as well as the largest securities class action recovery in the Seventh Circuit); *In re UnitedHealth Group Inc. Sec. Litig.*, No. 0:06-cv-01691-JMR-FLN (D. Minn.) ($925 million recovery is the largest securities class action recovery in the Eighth Circuit); *In re Qwest Commc'ns Int'l, Inc. Sec. Litig.*, No. 1:01-cv-01451-REB-KLM (D. Colo.) ($445 million recovery is the largest securities class action recovery in the Tenth Circuit); *In re HealthSouth Corp. Sec. Litig.*, No. 2:03-cv-01500-KOB-TMP (N.D. Ala.) ($671 million recovery is the largest securities class action recovery in the Eleventh Circuit).

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on August 17, 2020, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses on the attached Electronic Mail Notice List, and I hereby certify that I caused the mailing of the foregoing via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

s/ David A. Rosenfeld

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