UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re CHEMBIO DIAGNOSTICS, INC. SECURITIES LITIGATION	:	20-CV-2706 (ARR) (JMW) (Consolidated)
This Document Relates To: ALL ACTIONS	:	**OPINION & ORDER**

ROSS, United States District Judge:

Lead plaintiffs Municipal Employees' Retirement System of Michigan ("MERS"), Special Situations Fund III QP, L.P., Special Situations Cayman Fund, L.P., and Special Situations Private Equity Fund, L.P. (the "Funds") move for (1) certification of a class action for purposes of settlement; (2) approval of the form and manner of settlement notices to members of the class; (3) preliminary approval of the proposed settlement of this action; and (4) scheduling of a settlement hearing. For the reasons set forth below, I certify the class as proposed, approve the form and manner of the proposed notices, provide preliminary approval of the proposed settlement, and schedule the settlement hearing for Monday, June 5, at 11 a.m. I further order the lead plaintiffs to provide certain additional information via their anticipated motion for final approval of the settlement on or before April 24, 2023, so that I and any members of the class who may wish to opt out or object may fully evaluate the terms of the class settlement.

BACKGROUND

Knowledge of the facts alleged in this action is assumed. During the summer of 2020, four putative class actions were brought against defendant Chembio Diagnostics, Inc. ("Chembio") and several of its senior executives and directors, as well as against Robert W. Baird & Co. Inc.

("Baird") and Dougherty & Company LLC ("Dougherty"). The latter two defendants were the underwriters of Chembio's May 7, 2020, secondary stock offering. The putative class actions alleged violations of the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act") based on the May 2020 secondary stock offering and Chembio's public representations concerning the efficacy of its COVID-19 antibody test. These actions were consolidated into the current action and lead plaintiffs and class counsel were appointed on December 29, 2020. *See* ECF No. 54 ("Consolidation Order").

Chembio makes diagnostic technology based on its "Dual Path Platform" ("DPP") technology. *See* Consolidated Am. Compl. ¶ 4 ("Compl."), ECF No. 64.[1] At the outset of the COVID-19 pandemic, the Secretary of the Department of Health and Human Services declared that the COVID-19 outbreak in the United States was a public health emergency and began granting emergency use authorizations ("EUAs") for diagnostic and antibody tests. *Id.* ¶¶ 141, 145–46. In March 2020, Chembio developed and launched its DPP COVID-19 IgM/IgG System (the "Test"), which purported to be able to test a blood sample to determine whether the person providing the sample was or had been infected with COVID-19. *Id.* ¶¶ 6, 172, 198. In applying for an EUA, Chembio submitted data representing that the Test had strong success rates at identifying the presence of COVID-19 antibodies and the absence of such antibodies. *Id.* ¶¶ 173–74.

The FDA granted Chembio an EUA for its COVID-19 test for use in laboratory settings, resulting in a sharp increase in Chembio's share price from $3.10 per share on March 11, 2020 to $15.54 per share on April 24, 2020. *Id.* ¶¶ 12–13. Beginning in late April 2020, the FDA informed Chembio that an independent evaluation of the Chembio test demonstrated higher false positive

[1] Because the class settlement also settles Exchange Act claims, which are included in the Consolidated Amended Complaint but not the Second Consolidated Amended Complaint, factual allegations are derived from the former unless otherwise indicated.

and false negative rates than Chembio had indicated in its submissions. *See id.* ¶¶ 181, 184. On May 4, 2020, Chembio hosted a conference call with investors during which defendant Richard Eberly, Chembio's CEO, stated that "[t]he accuracy of the [Test] after [eleven] days post the onset of symptoms is 100% for total antibodies." *Id.* ¶ 206.

On May 11, 2020, Chembio's secondary offering of stock closed, during which Chembio sold approximately 2.6 million shares of Chembio stock at $11.75 per share. *Id.* ¶¶ 15, 218. Baird and Dougherty acted as underwriters of the May 2020 stock offering. *Id.* ¶ 90.

On June 16, 2020, the FDA revoked the EUA for Chembio's test, citing the test's "poor clinical performance" and concluding that it was "not reasonable to believe the product may be effective in detecting antibodies against [COVID-19]." Sigismondi Decl., Ex. C, ECF No. 84-1. On June 17, 2020, Chembio acknowledged the revocation of its EUA, and Chembio's share price fell over 60%, to $3.89 per share on June 17, 2020. Compl. ¶¶ 23–25.

After the putative class actions were consolidated, the lead plaintiffs filed a Consolidated Amended Complaint alleging violations of Sections 11, 12(a)(2), and 15 of the Securities Act and Sections 10(b) (and Rule 10b-5 thereunder) and 20(a) of the Exchange Act. On February 23, 2022, I dismissed the Securities Act claims, except under Sections 11 and 12(a)(2) as to Baird and Dougherty, and dismissed the Exchange Act claims in their entirety with prejudice. Op. & Order 37, ECF No. 93. Lead plaintiffs moved for reconsideration; I denied this motion on July 21, 2022. ECF No. 106. Lead plaintiffs then filed a Second Consolidated Amended Complaint, which alleged solely Securities Act violations against all defendants. *See* ECF No. 107 ("Am. Compl."). Defendants did not move to dismiss the Second Consolidated Amended Complaint.

The parties entered mediation, and on August 30, 2022 advised the court that they had reached a settlement in principle. *See* ECF No. 113. On December 28, 2022, the lead plaintiffs

filed their motion for preliminary approval of the settlement, class certification, and approval of the class notice. ECF No. 117.

DISCUSSION

A. The Motion to Certify the Class Is Granted

Federal Rule of Civil Procedure 23 requires that I certify the action as a class action, including where I am asked to certify the class for settlement purposes. *See* Fed. R. Civ. P. 23(c)(1), (e)(1)(B). A class action may only be maintained where the prerequisites of Rule 23(a) are met and the class action meets the requirements of one of the three types of class actions described in Rule 23(b). Here, the plaintiffs seek to certify the class under Rule 23(b)(3).

The "class" is defined as:

> (a) all Persons who purchased Chembio common stock directly in or traceable to Chembio's May 2020 Offering pursuant to the Registration Statement, and (b) all other Persons who purchased or otherwise acquired Chembio securities during the Class Period.

Stipulation & Agreement of Settlement ("Stipulation") ¶ 1.6, ECF No. 117-2.

The definition of "class" excludes defendants themselves, their family, officers of defendant entities, and other related parties, as well as any person or entity who would otherwise be a class member but validly and timely excludes themselves from the class. *Id.* The "class period" is defined as "the period from March 12, 2020 through June 16, 2020, inclusive." *Id.* ¶ 1.8.

1. *The Rule 23(a) Requirements Are Satisfied*

All class actions must comply with the four requirements of Rule 23(a). First, the class must be "so numerous that joinder of all members is impractical." Fed. R. Civ. P. 23(a)(1). Second, there must be "questions of law or fact common to the class." *Id.* 23(a)(2). Third, "the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class." *Id.*

23(a)(3). Finally, I must find that "the representative parties will fairly and adequately protect the interests of the class." *Id.* 23(a)(4).

a. Numerosity

The requirement that the number of putative class members be sufficiently numerous that joinder of all members in this action would be impracticable is easily met. There were more than 17 million outstanding shares of Chembio stock during the Class Period, and 2.6 million shares were issued in the May 2020 offering. *See* Compl. ¶¶ 15, 266(b). "[T]he numerosity inquiry is not strictly mathematical but must take into account the context of the particular case . . . ." *Pa. Pub. Sch. Emps. Ret. Sys. v. Morgan Stanley & Co.*, 772 F.3d 111, 120 (2d Cir. 2014). Courts have identified this threshold as met where there are as few as fourteen members, but generally treat any proposed class of more than forty potential class members as meeting numerosity requirement of Rule 23(a)(1). *See Westchester Indep. Living Ctr., Inc. v. State Univ. of N.Y.*, 331 F.R.D. 279, 288–90 (S.D.N.Y. 2019) (collecting cases and determining that there would likely be more than forty potential class members). Given the number of outstanding shares during the class period, the numerosity requirement is met and joinder of all class members would be impracticable.

b. Common Questions of Law or Fact

There are numerous questions of law and fact common to each class member. The allegations here turn on the legal questions of whether Chembio's alleged omissions and/or misstatements to the public and in its offering materials were material (with respect to both the Securities Act and Exchange Act claims), the knowledge or recklessness of Chembio in making these statements (with respect to the Exchange Act claims), and the impact of these statements on Chembio's stock price. Pls.' Mem. in Supp. Mot. for Prelim. Approval of Settlement ("Mem.") 19–20, ECF No. 117-1; Op. & Order 15, 24–25 (discussing elements of the Securities Act and Exchange Act claims). "Commonality requires the plaintiff to demonstrate that the class members

'have suffered the same injury,'" meaning that the class members' "claims must depend on a common contention . . . [which] must be of such a nature that it is capable of classwide resolution." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–50 (2011) (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). The "common contention[s]" in this case are numerous—most significantly with respect to the materiality of Chembio's alleged misstatements and omissions—and their resolution would help resolve the action with respect to each class member.

c. Typicality

Lead plaintiffs' claims are typical of the other members of the class because they share the same factual and legal background; the Funds purchased 125,000 shares in the May 2020 offering at the offering price of $11.75 per share and MERS purchased Chembio common stock during the Class Period. *See* Am. Compl. ¶¶ 34–35.

d. Adequacy of Representation

Lead plaintiffs are adequate class representatives. Like all other class members, lead plaintiffs either purchased stock in the May 2020 offering or at market prices during the Class Period and were allegedly injured by the same misrepresentations and omissions as other class members. Further, counsel in this case is qualified and experienced and I find they have ably conducted the litigation through two rounds of briefing. *See* Consolidation Order 9, 11 (discussing class counsel's qualifications). I have no concerns with class counsel's ability to continue to adequately represent the class.

2. *Rule 23(b)(3)'s Requirements Are Met*

a. Common Questions Predominate

The elements of both the Securities Act and Exchange Act causes of action focus primarily on the conduct of defendants. As noted above, the common questions of fact here involve the defendants' knowledge, whether their statements were materially misleading or omitted necessary

information required to make the statements not misleading in context, and the impact of these statements and their correction on Chembio's share price. Although each Class Member will have suffered separate damages, the fact that the individual damages will differ does not create an individual question that predominates over common questions. *See Strougo v. Barclays PLC*, 312 F.R.D. 307, 313 (S.D.N.Y. 2016) ("Issues and facts surrounding damages have rarely been an obstacle to establishing predominance in section 10(b) cases."); *Carpenters Pension Tr. Fund of St. Louis v. Barclays PLC*, 310 F.R.D. 69, 99 (S.D.N.Y. 2015) (noting that common questions will predominate where a litigant's "theory of liability matches their theory of damages"); *In re IndyMac Mortgage-Backed Sec. Litig.*, 286 F.R.D. 226, 241–42 (S.D.N.Y. 2012) (finding predominance where the materiality element was based on an objective basis and noting that "[i]ssues regarding individualized damages calculations generally . . . are not sufficient to defeat class certification" (internal quotation and citation omitted)).

b. A Class Action is Superior to Other Methods of Adjudication

Rule 23(b)(3) also requires that I determine "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy," including "class members' interests in individually controlling the prosecution or defense of separate actions[,] . . . any litigation concerning the controversy already begun by or against class members," the "desirability" of litigating these claims in this forum, and "the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3)(A)–(D). Each factor militates in favor of a class action as opposed to individual actions. Any attempt to handle this action via individual actions by class members against defendants would likely result in significant duplication of class member and judicial resources and would create the possibility of inconsistent judgments. Further, the putative class actions filed in the Eastern District of New York have already been consolidated into this action, I am not aware of any other pending action. This forum is appropriate because Chembio is

headquartered in Hauppauge, New York, which is within the Eastern District of New York. Finally, I see no potential difficulties managing this settlement class action.

3. Conclusion

In light of the foregoing, I certify the class as proposed by the plaintiffs.

B. The Class Notice Is Appropriate

For a class action certified pursuant to Rule 23(b)(3), the notice directed to class members must be "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B). The notice must contain certain information described in Rule 23(c)(2)(B)(i)–(vii) and must also comply with the requirements of the Private Securities Litigation Reform Act.[2] *See* 15 U.S.C. § 78u–4(a)(7)(A)–(F). I find that the proposed notice is adequate and contains all information required under the PSLRA and the Federal Rules.

"Notice need not be perfect, but need only be the best notice practicable under the circumstances, and each and every class member need not receive actual notice, so long as class counsel acted reasonably in choosing the means likely to inform potential class members." *In re Merrill Lynch & Co., Inc. Rsch. Reps. Sec. Litig.*, 246 F.R.D. 156, 166 (S.D.N.Y. 2007). The plaintiffs have filed their proposed notice and proof of claim forms on the docket. *See* Stipulation, Ex. A-1 ("Notice"), ECF No. 117-2. Plaintiffs have also addressed the manner of notice in their proposed order for settlement approval and the issuance of notice. *See* Stipulation & Agreement of Settlement, Ex. A ("Proposed Order"), ECF No. 117-2.

[2] Defendants were also required to serve a notice of proposed settlement to federal and state officials pursuant to 28 U.S.C. § 1715 within ten days of the filing of the proposed settlement. Defendants have filed a declaration stating that this notice was made within the required time frame. *See* Declaration of Stephanie Fiereck, ECF No. 119.

The Notice will be distributed in three ways. First, a claims administrator will mail the notice and proof of claim forms to all class members whom it can identify with reasonable effort, including mailing all class members identified by Chembio's transfer agent and brokers and other nominees who purchased Chembio stock on behalf of others. Proposed Order ¶¶ 10–11. Second, the claims administrator will publish a summary notice in the national edition of *The Wall Street Journal* and via a national newswire service. *Id.* ¶ 10(b). Finally, the claims administrator will maintain a settlement website where class members may access the Notice and other materials. *Id.* ¶ 10(a).

As plaintiffs note, this method of notice is frequently approved by courts. *See, e.g.*, *In re IMAX Sec. Litig.*, 283 F.R.D. 178, 184–85 (S.D.N.Y. 2012) (approving initial mailing of notice to "1,813 banks, brokerage companies, and institutional investors, which may have traded the common shares of IMAX in their clients' or their own accounts" after which these entities requested additional mailings to individuals, in addition to published summary notices and use of a settlement website). I agree that the method of notice proposed is sufficient to meet the requirement that it be the "best notice that is practicable under the circumstances," Fed. R. Civ. P. 23(c)(2)(B), in light of the fact that stock is often purchased by individuals via an intermediary.

I also find that the Notice satisfies the requirements of Rule 23(c)(2)(i)–(vii). The Notice describes the nature of the action, Notice at 4–6, contains the class definition, *id.* at 6, identifies the claims, issues, and defenses, *id.* at 5–6, informs class members that they may enter an appearance through an attorney, *id.* at 11, describes the process for seeking exclusion from the class, *id.* at 10–11, and explains that the judgment will bind members who remain in the class, *id.* at 7–10, 12. The Notice also complies with the PSLRA's requirements. *See* 15 U.S.C. § 78u-4(a)(7)(A)–(F); Notice at 2–4.

C. The Settlement Is Likely to Receive My Final Approval

Notice may only be issued "if giving notice is justified by the parties' showing that the court will likely be able to[] approve the proposal under Rule 23(e)(2)." Fed. R. Civ. P. 23(e)(1)(B)(i). Rule 23(e)(2) in turn requires that I find that the settlement "is fair, reasonable, and adequate after considering" the following enumerated factors:

> (A) the class representatives and class counsel have adequately represented the class;
> (B) the proposal was negotiated at arm's length;
> (C) the relief provided for the class is adequate, taking into account:
> (i) the costs, risks, and delay of trial and appeal;
> (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
> (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
> (iv) any agreement required to be identified under Rule 23(e)(3); and
> (D) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2)(A)–(D).

A settlement's fairness is determined "by looking at both the settlement's terms and the negotiating process leading to settlement." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (citation omitted). There is a "strong judicial policy in favor of settlements, particularly in the class action context." *In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998). Further, I may presume that a settlement is fair, adequate, and reasonable where "a class settlement [was] reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." *Wal-Mart Stores*, 396 F.3d at 116 (citing *Manual For Complex Litigation (Third)* § 30.42 (1995)). In this circuit, courts also review the settlement against the nine factors identified in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000), many of which overlap with the requirements of Rule 23(e)(2). *See, e.g.*, *Calibuso v. Bank of America*

Corp., 299 F.R.D. 359, 366–67 (E.D.N.Y. 2014) (discussing application of *Grinnell* and Rule 23(e)(2)). These factors are:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation."

Grinnell, 495 F.2d at 463 (internal citations omitted).

1. *Rule 23(e)(2) Factors*

a. The Class Was Adequately Represented by Counsel and the Representatives

I find that class counsel and the class representatives have adequately litigated this case on behalf of the class. Class counsel have substantial experience in complex securities class actions, *see* Mem. 9–10 (collecting cases), and capably litigated both the motion to dismiss and motion for reconsideration. Class counsel has also represented that they undertook an extensive investigation of the claims and defenses, consulted with a damages expert, and engaged in spirited mediation with the defendants, resulting in the settlement of this action. For these reasons, I believe it is likely that I will find that the class was adequately represented.

b. The Settlement Was Negotiated at Arm's Length

The parties engaged in two rounds of mediation with an experienced mediator, resulting in this settlement. The "presumption of fairness, adequacy, and reasonableness" attaches following "arm's-length negotiations between experienced, capable counsel *after meaningful discovery*." *Wal-Mart Stores, Inc.*, 396 F.3d at 116 (emphasis added). Although discovery never took place in this action because the parties settled soon after I denied plaintiffs' motion to reconsider, I find that the lack of discovery is mitigated by the procedural posture and surviving claims in the case. As I discussed in my opinion on the defendants' motion to dismiss, Securities Act claims have a

relatively low standard of scienter and rely primarily on the materiality of the misstatements made. Op. & Order 24–25 (discussing the "virtually absolute liability" faced by issuers and negligence standard for underwriters for claims under Sections 11 and 12 of the Securities Act). Discovery would not likely have revealed much further information that would bear on the value of the Securities Act claims, and those claims would have to be fully litigated prior to appeal of my dismissal of the Exchange Act claims. Because the parties reached this settlement after an arm's-length negotiation between competent counsel and with the assistance of a third-party mediator, it is likely that I will find this factor met.

c. The Relief Provided for the Class is Adequate, Although Some Questions Remain

The total relief afforded the class by this settlement is $8.1 million. On a per-share basis, the settlement amounts to approximately $0.65 per share before deducting plaintiffs' counsel's requested attorneys' fees and costs. Notice at 2. Plaintiffs' counsel anticipates moving for a fee award to be paid from the settlement amount of 27.5% and costs not to exceed $50,000. After fees and costs, the per-share recovery would be approximately $0.47. *Id.* at 3.

Plaintiffs aver that this recovery is approximately 14% of their "maximum estimated recoverable damages" of $58.4 million for the combined Securities Act and Exchange Act claims. Mem. 16. Plaintiffs do not describe how they calculated this maximum figure, although presumably they derived this figure from their "extensive[]" consultations with a damages expert. Mem. 14.

Finally, the plan of distribution for the settlement will distribute approximately 37.16% of recovery to claims under the Exchange Act and the remaining 62.84% to claims under the Securities Act. Plaintiffs have not explained in their submissions how the proportion was calculated.

The amounts recoverable by Securities Act claimants are calculated as either (i) the May 2020 offering price of $11.75 less the price at which shares were sold, if sold prior to the filing of this action; or (ii) the lesser of $11.75 less the sales price or $11.75 minus $5.30 (the closing Chembio share price as of the date this action was filed), for shares sold or retained after this action was filed. *See* Notice at 15. The amounts recoverable by Exchange Act claimants is either (i) nothing, if shares were sold prior to the revocation of the EUA and Chembio's public announcement on June 17, 2020; (ii) for shares sold after the revocation of the EUA and during the PSLRA's 90-day "look-back" period, which ended on September 14, 2020, *see* 15 U.S.C. § 78u-4(e)(1), the lesser of (a) the inflated value of the share at the time of purchase; (b) the difference between the purchase price and the selling price; and (c) the difference between the purchase price and the average closing price up to the date of sale as described in the plan of allocation; or (iii) if retained or sold after September 14, 2020, the lesser of (a) the inflated value of the share at the time of purchase; (b) the difference between the purchase price and the selling price; and (c) the difference between the purchase price and $4.57, the 90-day average price during the look-back period. Notice at 14, 16–18.

In evaluating the adequacy of the settlement, I agree with plaintiffs' statement that "[s]ecurities class actions are notoriously complex and present numerous hurdles to proving liability and damages." Mem. 11. I am also mindful of the fact that defendants continue to dispute plaintiffs' allegations and of the high costs of a drawn-out, hard-fought litigation. Further, although I dismissed the Exchange Act claims with prejudice, plaintiffs continue to assert that these claims have merit and this settlement accounts for the possibility that the Exchange Act claims would be revived on appeal. The appeal would occur only after the resolution of the Securities Act claims on dispositive motion or at trial and any discovery necessary to the Exchange Act claims would

no doubt cause further delay. In short, the settlement offers benefits in the form of a quick cash payment to class members upon entry of a judgment, rather than an uncertain payout in the future.

I am also obliged to consider the propriety of the attorneys' fees to be sought by plaintiffs' counsel, as well as the timing of payment. Lead plaintiffs also intend to seek awards not to exceed $4,000 for their representation of the class. Lead counsel intends to move for a fee award constituting 27.5% of the settlement amount of $8.1 million and no more than $50,000 in costs. The percentage share of attorneys' fees is in line with fee awards frequently approved in class actions in this circuit. *See, e.g.*, *Jenkins v. Nat'l Grid USA Serv. Co., Inc.*, No. 15-CV-1219 (JS), 2022 WL 2301668, at *3–4 (E.D.N.Y. June 24, 2022) (granting fee award of $12.7 million on total settlement of $38.5 million, or approximately 30% of the total settlement amount); *In re Teva Sec. Litig.*, No. 17-CV-558 (SRU), 2022 WL 16702791, at *1 (D. Conn. June 2, 2022) (granting fees in the amount of 23.7% of the settlement fund of $420 million, plus $9.7 million in expenses); *In re Perrigo Co. PLC Sec. Litig.*, No. 19-CV-70 (DLC), 2022 WL 500913, at *1–2 (S.D.N.Y. Feb. 18, 2022) (granting fees in the amount of 33 and 1/3% of the settlement fund of $31.9 million). Further, the Stipulation explicitly provides that fees and expenses will be paid only after the judgment and an order authorizing the fees and expenses are executed. Stipulation ¶ 7.2.

I must consider whether there is "any agreement required to be identified under Rule 23(e)(3)," Fed. R. Civ. P. 23(e)(2)(C)(iv), which requires the parties to "file a statement identifying any agreement made in connection with the proposal," Fed. R. Civ. P. 23(e)(3). According to plaintiffs, "[t]he parties have entered into a standard supplemental agreement which provides Chembio with the option to terminate the [s]ettlement if [c]lass [m]embers with a certain amount of purchases of Chembio common stock request exclusion from the [c]lass." Mem. 13. However, no detail as to the amount of purchases required to allow Chembio to terminate the settlement has

been provided. Without further information, I cannot consider the impact of this separate agreement, if any, on my final approval of the settlement.

d. Questions Remain Concerning the Relative Treatment of Class Members

Finally, I must consider whether the proposal treats class members equitably relative to each other. The plan of allocation offers 37.16% of the settlement amount (net of fees and costs) to Exchange Act claimants and the remainder to Securities Act claimants. Although plaintiffs have not explained how this distribution was determined, presumably it results from a combination of at least three factors: (1) the fact that the Exchange Act claims were dismissed with prejudice and recovery of damages for these claims via further litigation would be contingent on a successful appeal; (2) as I have noted, Exchange Act claims require more burdensome proof of scienter than the Securities Act claims and would be less likely to result in recovery as compared to the Securities Act claims; and (3) the Exchange Act claims apply to a wider range of shareholders than the Securities Act claims, which are limited to the 2.6 million shares purchased in or traceable to the May 2020 offering. However, without additional background on the basis for the proposed treatment of class members relative to each other, I will not be able to make a final determination of the equitable treatment of class members relative to each other.

e. Conclusion

I believe I am likely to find that the requirements of Rule 23(e)(2) are met, but as I have noted there are items for which I require more clarification before granting final approval to the settlement. These items must be addressed on plaintiffs' anticipated motion for final approval of the settlement.

First, plaintiffs must explain how they concluded that their maximum reasonable recovery was $58.4 million, including by reference to the evaluation conducted by their damages expert, if that evaluation is the source of the maximum recovery.

Second, plaintiffs must provide further detail on the agreement that would entitle Chembio to terminate the settlement, including by identifying the percentage of shares outstanding that must opt out of the settlement in order for Chembio to withdraw from the settlement agreement.

Third, plaintiffs must robustly explain the justification for the proposed plan of allocation between Exchange Act and Securities Act claimants, with specific reference to how the division of the fund between these claimants was calculated.

2. *The Remaining Grinnell Factors Favor Approval*

a. The Stage of the Proceedings

Although no discovery has occurred in this action, I have already discussed that the surviving Securities Act claims would require relatively little discovery, while the resuscitation of the Exchange Act claims would require full litigation of the Securities Act claims, followed by an appeal, then followed by Exchange Act discovery. The parties have already engaged in two rounds of briefing concerning the motion to dismiss, engaged in two rounds of mediation, and plaintiffs represent that the complaint was based on an extensive investigation. This factor supports approval.

b. The Risks of Maintaining the Class Action Through Trial

Notably, because of the settlement posture of this case, defendants do not oppose class certification. The plaintiffs argue that in addition to the motion practice that would accompany class certification if this action were not settled, defendants could also later move to decertify the class or to shorten the class period. Mem. 15 (citing Fed. R. Civ. P. 23(c) (authorizing alteration or amendment of the class certification order at any time "before final judgment")).

c. Chembio Has Limited Ability to Withstand a Larger Judgment

Plaintiffs suggest that there is "substantial doubt that Chembio [can] withst[and] a judgment above the [s]ettlement [a]mount" of $8.1 million. Mem. 15. I take judicial notice of the

fact that as of September 30, 2022, Chembio had cash and cash equivalents on hand of approximately $21.1 million and total equity of $17.8 million. *See* Chembio Diagnostics, Inc., Quarterly Report (Form 10-Q) at 4 (Nov. 3, 2022), https://chembiodiagnosticsinc.gcs-web.com/static-files/52331cfc-b66f-47ad-9f66-9f36f8d41af8. Although Chembio is not paying the full amount of the $8.1 million settlement, even a payment of half the settlement amount would consume approximately 20% and 25% of Chembio's cash and equity balances, respectively.

d. Conclusion

I would likely find that the remaining *Grinnell* factors are met, once I receive the additional information bearing on the adequacy of the recovery, discussed *supra*. Additionally, following the issuance of the notice, I will be able to evaluate the second *Grinnell* factor, which requires examining the reaction of the class.

CONCLUSION

The settlement approval hearing is hereby scheduled for Monday, June 5, 2023, at 11 a.m. to be held in Courtroom 8C South at the United States Courthouse located at 225 Cadman Plaza East, Brooklyn, NY 11201. Plaintiffs are directed to provide further detail on the three topics I identified in their anticipated motion for final approval of the settlement.

The plaintiffs' proposed schedule of settlement events, Mem. 21, is approved with the modification that lead plaintiffs' anticipated motion for final approval of the settlement, application for attorneys' fees, and application for an award to the lead plaintiffs shall be due 42 calendar days before the hearing, on or before April 24, 2023, so that class members who wish to opt out or object have 21 days to consider the additional information I have ordered the lead plaintiffs to include in their motion. I approve all other proposed deadlines.

A signed version of the proposed order granting preliminary approval to the settlement is attached to this opinion, with minor alterations as discussed in this opinion.

SO ORDERED.

Dated: February 3, 2023
Brooklyn, NY

/s/
Allyne R. Ross
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re CHEMBIO DIAGNOSTICS, INC. SECURITIES LITIGATION	Civil Action No. 2:20-cv-02706-ARR-JMW
	CLASS ACTION
This Document Relates To: ALL ACTIONS.	~~[PROPOSED]~~ ORDER GRANTING PRELIMINARY APPROVAL PURSUANT TO FED. R. CIV. P. 23 AND AUTHORIZING NOTICE TO THE CLASS
	EXHIBIT A

WHEREAS, an action is pending in this Court entitled *In re Chembio Diagnostics, Inc. Securities Litigation*, Civil Action No. 2:20-cv-02706-ARR-JMW (the "Action");

WHEREAS, (i) Lead Plaintiffs Municipal Employees' Retirement System of Michigan ("MERS"), Special Situations Fund III QP, L.P., Special Situations Cayman Fund, L.P., and Special Situations Private Equity Fund, L.P. (the "Funds") (collectively, "Lead Plaintiffs"), on behalf of themselves and Members of the Class; (ii) Defendant Chembio Diagnostics, Inc. ("Chembio" or the "Company"); (iii) Defendants Richard L. Eberly, Gail S. Page, Neil A. Goldman, Javan Esfandiari, Katherine I. Davis, Dr. Mary Lake Polan, Dr. John G. Potthoff (collectively, the "Individual Defendants," and together with "Chembio," the "Chembio Defendants"); and (iv) Defendants Robert W. Baird & Co. Inc. and Dougherty & Company LLC (together, the "Underwriter Defendants," and with the "Chembio Defendants," the "Defendants"), have determined to settle all claims asserted against Defendants in the Action with prejudice on the terms and conditions set forth in the Stipulation and Agreement of Settlement dated December 28, 2022 (the "Stipulation"), subject to approval of this Court (the "Settlement");

WHEREAS, Lead Plaintiffs, have made a motion pursuant to Rule 23(e) of the Federal Rules of Civil Procedure for an order preliminarily approving the Settlement in accordance with the Stipulation and Exhibits annexed thereto, and allowing notice of the Settlement to Class Members as more fully described therein;

WHEREAS, the Settling Parties have stipulated to the entry of this Order;

WHEREAS, the Court has read and considered: (a) Lead Plaintiffs' motion for preliminary approval of the Settlement and authorizing notice of the Settlement to the Class and the papers filed and arguments made in connection therewith; and (b) the Stipulation and the exhibits attached thereto; and

WHEREAS, unless otherwise defined, all terms used herein have the same meanings as they have in the Stipulation;

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. **Preliminary Approval of the Settlement:** The Court hereby preliminarily approves the Settlement set forth in the Stipulation, and finds, pursuant to Rule 23(e)(1)(B)(i) of the Federal Rules of Civil Procedure, that it will likely be able to grant final approval to the Settlement under Rule 23(e)(2) as being fair, reasonable, and adequate to the Class, subject to further consideration at the Settlement Hearing to be conducted as described below.

2. **Preliminary Certification of the Class:** Pursuant to Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure, and for purposes of this Settlement only, the Action is hereby certified as a class action on behalf of, collectively: (a) all Persons who purchased Chembio common stock directly in or traceable to Chembio's secondary public offering pursuant to a Prospectus Supplement dated May 7, 2020 (the "May 2020 Offering"); and (b) all other Persons who purchased or otherwise acquired Chembio securities during the period between March 12, 2020 through June 16, 2020, inclusive. Excluded from the Class are: (i) Defendants; (ii) Immediate Family of the Individual Defendants; (iii) any Person who was an officer or director of Chembio or an Underwriter Defendant during the Class Period; (iv) any firm, trust, corporation, or other entity in which any Defendant has or had a controlling interest (provided, however, that any Investment Vehicle shall not be excluded from the Class); and (v) the legal representatives, affiliates, heirs, successors-in-interest, or assigns of any such excluded Person. Also excluded from the Class is any Person who would otherwise be a Member of the Class but who validly and timely requests exclusion in accordance with the requirements set by the Court.

3. **Class Action for Settlement Purposes Only:** The Court finds, for the purpose of the Settlement only, that the prerequisites for a class action under Rules 23(a) and (b)(3) of the Federal Rules of Civil Procedure have been satisfied in that: (a) the number of Class Members is so numerous that joinder of all members is impracticable; (b) there are questions of law and fact common to the Class; (c) the claims of Lead Plaintiffs are typical of the claims of the Class they seek to represent; (d) Lead Plaintiffs and Lead Counsel have and will fairly and adequately represent the interests of the Class; (e) the questions of law and fact common to Members of the Class predominate over any questions affecting only individual Class Members; and (f) a class action is superior to other methods for the fair and efficient adjudication of the Action.

4. **Preliminary Certification of Class Representatives and Class Counsel for Settlement Purposes Only:** Pursuant to Rule 23 of the Federal Rules of Civil Procedure, and for the purposes of the Settlement only, Lead Plaintiffs Municipal Employees' Retirement System of Michigan, Special Situations Fund III QP, L.P., Special Situations Cayman Fund, L.P., and Special Situations Private Equity Fund, L.P. are preliminarily certified as Class Representatives and Lead Counsel (Robbins Geller Rudman & Dowd LLP and Rolnick Kramer Sadighi LLP) are preliminarily certified as Class Counsel.

5. **Settlement Hearing:** A Settlement hearing shall be held before this Court on June 5, 2023, at 11 a.m. (the "Settlement Hearing"), at the United States District Court for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, NY 11201, to: (a) determine whether the proposed Settlement of the Action on the terms and conditions provided for in the Stipulation is fair, reasonable and adequate to the Class and should be approved by the Court; (b) determine whether a Judgment as provided in ¶1.19 of the Stipulation, which provides, among other things, for dismissal of the Action with prejudice, should be entered; (c) determine whether the

proposed Plan of Allocation for the proceeds of the Settlement is fair and reasonable and should be approved; (d) determine the amount of attorneys' fees, costs, charges, and expenses that should be awarded to Lead Counsel and Lead Plaintiffs; (e) hear any objections by Class Members to the Settlement or Plan of Allocation, or to the award of attorneys' fees and expenses to Lead Counsel or Lead Plaintiffs; and (f) consider any other matters that the Court deems appropriate, including those identified in the opinion accompanying this order. Notice of the Settlement and the Settlement Hearing shall be given to Class Members as set forth in paragraph 10 of this Order. The Court may adjourn or change the date and time of the Settlement Hearing or decide to hold the Settlement Hearing telephonically without further notice to the Class, and may approve the proposed Settlement with such modifications as the Settling Parties may agree to, if appropriate, without further notice to the Class.

6. **Approval of the Form and Content of Settlement Notice:** The Court approves as to form and content, the Notice of Pendency and Proposed Settlement of Class Action ("Notice"), Proof of Claim and Release, and the Summary Notice of Proposed Settlement of Class Action ("Summary Notice"), substantially in the forms annexed hereto as Exhibits 1, 2, and 3, respectively.

7. **Distribution and Publication of Notice and Proof of Claim Form:** The Court finds that the mailing and distribution of the Notice and the Proof of Claim and Release and the publication of the Summary Notice in the manner and form set forth in paragraphs 10 and 11 of this Order (a) is the best notice practicable under the circumstances; and (b) constitutes notice that is reasonably calculated, under the circumstances, to apprise Class Members of the proposed Settlement, of the effect of the Settlement (including the Releases to be provided thereunder), of Lead Counsel's Fee and Expense Application, of their right to request exclusion from the Class or to object to the Settlement, the Plan of Allocation, and/or Lead Counsel's Fee and Expense Application, and of their right to appear at the Settlement Hearing; (c) constitutes due, adequate, and

sufficient notice to all persons and entities entitled to receive notice of the proposed Settlement; and (d) satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure, the United States Constitution (including the Due Process Clause), the Private Securities Litigation Reform Act of 1995, 15 U.S.C. §77z-1, 78u-4, as amended, and all other applicable laws and rules. The date and time of the Settlement Hearing shall be included in the Notice and Summary Notice before they are mailed and published, respectively.

8. **Retention of Claims Administrator and Manner of Giving Notice:** The firm of Gilardi & Co. LLC ("Claims Administrator") is hereby appointed to supervise and administer the notice procedure as well as the processing of Claims as more fully set forth below.

9. **Provision of Transfer Records:** Chembio shall provide to the Claims Administrator, at no cost to Lead Plaintiffs or the Class, within seven (7) business days after the Court signs this Order, reasonably available transfer records in electronic searchable form, such as Excel, containing names and addresses of Persons who purchased Chembio common stock during the Class Period.

10. **Notification by Claims Administrator:**

(a) Not later than twenty (20) calendar days after the date of entry by the Court of this Order (the "Notice Date"), the Claims Administrator shall cause a copy of the Notice and Proof of Claim and Release, substantially in the forms annexed hereto as Exhibits 1 and 2, respectively (the "Settlement Notice Packet") to be mailed by First-Class Mail, or emailed, to potential Class Members who can be identified with reasonable effort, including those persons and entities listed on the records provided by Chembio and/or its transfer agent, and shall cause a copy of the Settlement Notice Packet to be mailed to the brokers and other nominees ("Nominees") contained in the Claims Administrator's Nominee database. For all Notices returned as undeliverable, the Claims

Administrator shall use its best efforts to locate updated addresses. Contemporaneously with the mailing of the Settlement Notice Packet, the Claims Administrator shall cause copies of the Notice and the Proof of Claim and Release to be posted on the case-designated website, www.ChembioSecuritiesSettlement.com, from which copies of the Notice and Proof of Claim and Release can be downloaded.

(b) Not later than seven (7) calendar days after the Notice Date, the Claims Administrator shall cause the Summary Notice, substantially in the form attached hereto as Exhibit 3, to be published once in *The Wall Street Journal*, and once over a national newswire service.

(c) At least seven (7) calendar days prior to the Settlement Hearing, Lead Counsel shall serve on Defendants' Counsel and file with the Court proof, by affidavit or declaration, of such mailing and publishing.

11. **Nominee Procedures:** The Claims Administrator shall use reasonable efforts to give notice to nominee purchasers such as brokerage firms and other persons or entities who purchased Chembio common stock during the Class Period (between March 12, 2020 and June 16, 2020, inclusive) as record owners but not as beneficial owners. Such nominee purchasers are directed, within seven (7) calendar days of their receipt of the Notice, to either forward copies of the Notice and Proof of Claim and Release to their beneficial owners or to provide the Claims Administrator with lists of the names and addresses of the beneficial owners, and the Claims Administrator is ordered to send the Notice and Proof of Claim and Release promptly to such identified beneficial owners. Nominee purchasers who elect to send the Notice and Proof of Claim and Release to their beneficial owners shall send a statement to the Claims Administrator confirming that the mailing was made as directed. Additional copies of the Notice shall be made available to any record holder requesting such for the purpose of distribution to beneficial owners, and such record holders shall be

reimbursed from the Settlement Fund, upon receipt by the Claims Administrator of proper documentation, for the reasonable expense of sending the Notice and Proof of Claim and Release to beneficial owners. Any disputes with respect to the reasonableness or documentation of expenses incurred shall be subject to review by the Court.

12. **Cost of Notice:** All fees, costs, and expenses incurred in identifying and notifying Members of the Class shall be paid from the Settlement Fund and in no event shall any of the Released Defendant Parties bear any responsibility or liability for such fees, costs, or expenses. Notwithstanding the foregoing, Chembio shall be responsible for the costs and expenses it incurs in providing to Lead Counsel and/or the Claims Administrator reasonably available transfer records for purposes of mailing notice to the Class pursuant to the Stipulation.

13. **CAFA Notice:** As provided in the Stipulation, Chembio shall effect service of the notice required under the Class Action Fairness Act, 28 U.S.C. §1715, *et seq.* ("CAFA") no later than ten (10) calendar days following the filing of the Stipulation with the Court. Chembio is solely responsible for the costs of the CAFA notice and administering the CAFA notice. No later than seven (7) calendar days before the Settlement Hearing, Chembio shall cause to be served on Lead Counsel and filed with the Court proof, by affidavit or declaration, regarding compliance with 28 U.S.C. §1715(b).

14. **Binding Effect:** All Class Members shall be bound by all determinations and judgments in the Action concerning the Settlement (including, but not limited to, the releases provided for therein) whether favorable or unfavorable to the Class, regardless of whether such Persons seek or obtain by any means (including, without limitation, by submitting a Proof of Claim and Release or any similar document) any distribution from the Settlement Fund or the Net Settlement Fund.

15. **Participation in Settlement:** Class Members who wish to participate in the Settlement and to be eligible to receive a distribution from the Net Settlement Fund must complete and submit a Proof of Claim and Release in accordance with the instructions contained therein. Unless the Court orders otherwise, all Proofs of Claim and Release must be postmarked or submitted electronically no later than one hundred twenty (120) calendar days from the Notice Date. Any Class Member who does not submit a Proof of Claim and Release within the time provided shall be barred from sharing in the distribution of the proceeds of the Net Settlement Fund, unless otherwise ordered by the Court, but shall in all other respects be bound by the terms of the Stipulation and by any final judgment entered by the Court. Notwithstanding the foregoing, Lead Counsel shall have the discretion (but not the obligation) to accept late-submitted Claims for processing by the Claims Administrator so long as distribution of the Net Settlement Fund is not materially delayed thereby. No person shall have any claim against Lead Plaintiffs, Lead Counsel, or the Claims Administrator by reason of the decision to exercise such discretion whether to accept late submitted Claims. By submitting a Proof of Claim and Release, a person shall be deemed to have submitted to the jurisdiction of the Court with respect to his, her or its Claim and the subject matter of the Settlement.

16. **Proof of Claim Form Requirements:** Each Proof of Claim and Release submitted must satisfy the following conditions: (a) it must be properly completed, signed, and submitted in a timely manner in accordance with provisions of the preceding paragraph; (b) it must be accompanied by adequate supporting documentation for the transactions and holdings reported therein, in the form of broker confirmation slips, broker account statements, an authorized statement from the broker containing the transactional and any holding information found in a broker confirmation slip or account statement, or such other documentation as is deemed adequate by Lead Counsel or the Claims Administrator; (c) if the person executing the Proof of Claim and Release is acting in a

representative capacity, a certification of his, her or its current authority to act on behalf of the Class Member, together with such evidence of authority to act on behalf of that Class Member as is specified in the Proof of Claim and Release, must be included in the Proof of Claim and Release to the satisfaction of Lead Counsel or the Claims Administrator; and (d) the Proof of Claim and Release must be complete and contain no material deletions or modifications of any of the printed matter contained therein and must be signed under penalty of perjury.

17. **Appearance of Class Members:** Any Member of the Class may enter an appearance in the Action, at his, her, or its own expense, individually or through counsel of his, her, or its own choice. If any Member of the Class does not enter an appearance, they will be represented by Lead Counsel.

18. **Consequences of Failure to Submit a Proof of Claim:** Any Class Member that does not timely and validly submit a Proof of Claim and Release or whose Claim is not otherwise approved by the Court: (a) shall be deemed to have waived his, her or its right to share in the Net Settlement Fund; (b) shall be forever barred from participating in any distributions therefrom; (c) shall be bound by the provisions of the Stipulation and the Settlement and all proceedings, determinations, orders, and judgments in the Action relating thereto, including, without limitation, the Judgment and the Releases provided for therein, whether favorable or unfavorable to the Class; and (d) will be forever barred from commencing, maintaining, or prosecuting any of the Released Plaintiffs' Claims against each and all of the Released Defendant Parties, as more fully described in the Stipulation and Notice. Notwithstanding the foregoing, late Proof of Claim and Releases may be accepted for processing as set forth in paragraph 15 above.

19. **Exclusion from the Class:**

(a) Any Member of the Class who wishes to exclude himself, herself, or itself from the Class must request exclusion in writing within the time and in the manner set forth in the Notice. Any such Person must submit to the Claims Administrator a signed request for exclusion ("Request for Exclusion") such that it is postmarked no later than May 15, 2023 (a date that is twenty-one (21) calendar days prior to the Settlement Hearing). A Request for Exclusion must provide: (i) the name, address, and telephone number of the Person requesting exclusion; (ii) a list identifying the number of shares of Chembio common stock purchased during the Class Period and the date of each purchase and price paid for each such purchase; and (iii) a statement that the Person wishes to be excluded from the Class. All Persons who submit valid and timely Requests for Exclusion in the manner set forth in this paragraph and the Notice shall have no rights under the Settlement, shall not share in the distribution of the Net Settlement Fund, and shall not be bound by the Settlement or any final Judgment. Unless otherwise ordered by the Court, any Person who purchased Chembio common stock during the Class Period who fails to timely request exclusion from the Class in compliance with this paragraph shall be deemed to have waived his, her, or its right to be excluded from the Class and shall be forever barred from requesting exclusion from the Class.

(b) Lead Counsel or the Claims Administrator shall cause to be provided to Defendants' Counsel copies of all Requests for Exclusion, and any written revocation of Requests for Exclusion, promptly upon receipt and as expeditiously as possible, but in no event, later than fourteen (14) calendar days before the Settlement Hearing.

20. **Appearance and Objection at the Settlement Hearing:** Any Member of the Class who or which does not request exclusion from the Class may appear at the Settlement Hearing and

object if he, she, or it has any reason why the proposed Settlement of the Action should not be approved as fair, reasonable and adequate, why a judgment should not be entered thereon, why the Plan of Allocation should not be approved, or why attorneys' fees, together with costs, charges and expenses should not be awarded to Lead Counsel or Lead Plaintiffs; provided that any such Class Member (or any other Person) files objections and copies of any papers and briefs with the Clerk of the United States District Court for the Eastern District of New York and mails copies of such objection to Lead Counsel, Robbins Geller Rudman & Dowd LLP, Ellen Gusikoff Stewart, 655 West Broadway, Suite 1900, San Diego, CA 92101 and Rolnick Kramer Sadighi LLP, Lawrence M. Rolnick, 1251 Avenue of the Americas, New York, NY 10020; the Chembio Defendants' Counsel, K&L Gates LLP, John W. Rotunno, 70 West Madison Street, Suite 3300, Chicago, IL 60602, and K&L Gates LLP, Joanna A. Diakos, 599 Lexington Avenue, New York, NY 10022; and the Underwriter Defendants' Counsel, Latham & Watkins LLP, Colleen C. Smith, 12670 High Bluff Drive, San Diego, CA 92130, so that they are received no later than May 15, 2023 (a date that is twenty-one (21) calendar days prior to the Settlement Hearing). Any Member of the Class who does not make his, her, or its objection in the manner provided shall be deemed to have waived such objection and shall forever be foreclosed from making any objection to the fairness, reasonableness, or adequacy of the proposed Settlement as incorporated in the Stipulation, to the Plan of Allocation, or to the award of fees, costs, charges, and expenses to Lead Counsel, unless otherwise ordered by the Court. Attendance at the Settlement Hearing is not necessary. However, Persons wishing to be heard orally in opposition to the approval of the Settlement, the Plan of Allocation, and/or the application for an award of fees, costs, charges and expenses are required to indicate in their written objection their intention to appear at the hearing and to include in their written objections the identity of any witnesses they may call to testify and copies of any exhibits they intend to introduce into

evidence at the Settlement Hearing. Class Members do not need to appear at the Settlement Hearing or take any other action to indicate their approval.

21. **Form of Objections:** Any objections, filings, and other submissions by an objecting Class Member must: (i) state the name, address and telephone number of the Person objecting and must be signed by the objector; (ii) contain a statement of the Class Members' objection or objections, and the specific reasons for each objection, including any legal and evidentiary support the Class Member wishes to bring to the Court's attention and whether the objections apply only to the objector, a specific subset of the Class, or to the entire Class; and (iii) include documents sufficient to prove membership in the Class, including the objecting Class Member's purchases and/or sales of Chembio common stock during the Class Period, the dates, the number of shares purchased or sold, and the price paid or received for such purchase or sale.

22. **Failure to Object:** Any Class Member who does not object to the Settlement, the Plan of Allocation, or Lead Counsel's application for an award of attorneys' fees, costs, charges and expenses in the manner prescribed herein and in the Notice shall be deemed to have waived such objection, and shall forever be foreclosed from making any objection to the fairness, adequacy, or reasonableness of the proposed Settlement, this Order and the Judgment to be entered approving the Settlement, the Plan of Allocation, and/or the application by Lead Counsel for an award of attorneys' fees together with costs, charges and expenses.

23. **Settlement Fund:** The contents of the Settlement Fund held by the Escrow Agent shall be deemed and considered to be in *custodia legis* of the Court, and shall remain subject to the jurisdiction of the Court until such time as such funds shall be distributed pursuant to the Stipulation and/or further order(s) of the Court.

24. **Supporting Papers:**

(a) All papers in support of the Settlement, Plan of Allocation, and any application by Lead Counsel for an award of attorneys' fees, costs, charges and expenses shall be filed and served no later than April 24, 2023 (a date that is ~~thirty-five (35)~~ forty-two (42) calendar days prior to the Settlement Hearing), and any reply papers shall be filed and served no later than May 30, 2023 (a date that is ~~seven (7)~~ six (6) calendar days prior to the Settlement Hearing).

(b) The Released Defendant Parties shall have no responsibility or liability for the Plan of Allocation or any application for attorneys' fees, costs, charges or expenses submitted by Lead Counsel, and such matters will be considered by the Court separately from the fairness, reasonableness, and adequacy of the Settlement.

25. **Determinations at Settlement Hearing:** At or after the Settlement Hearing, the Court shall determine whether the Plan of Allocation proposed by Lead Counsel, and any application for attorneys' fees, costs, charges and expenses, should be approved. The Court reserves the right to enter the Judgment finally approving the Settlement regardless of whether it has approved the Plan of Allocation or awarded attorneys' fees and/or costs, charges and expenses.

26. **Administration Fees and Expenses:** All reasonable expenses incurred in identifying and notifying Class Members as well as administering the Settlement Fund shall be paid as set forth in the Stipulation. In the event the Court does not approve the Settlement, or the Settlement otherwise fails to become effective, neither Lead Counsel nor the Claims Administrator shall have any obligation to repay any amounts actually and properly incurred or disbursed pursuant to ¶¶2.9 or 2.11 of the Stipulation.

27. **Use of this Order:** This Order and the Stipulation (including any of their respective terms or provisions and exhibits thereto), any of the negotiations, discussions, proceedings connected

with them, and any act performed or document executed pursuant to or in furtherance of the Stipulation or the Settlement or this Order, may not be construed as an admission or concession by the Released Defendant Parties of the truth of any of the allegations in the Action, or of any liability, fault, or wrongdoing of any kind, and may not be offered or received in evidence (or otherwise used by any person in the Action, or in any other litigation or proceeding, whether civil, criminal, or administrative, in any court, administrative agency, or other tribunal) except in connection with any proceeding to enforce the terms of the Stipulation or this Order. The Released Defendant Parties, Lead Plaintiffs, Class Members, and each of their counsel may file the Stipulation, and/or this Order, and/or the Judgment in any action that may be brought against them in order to support a defense or counterclaim based on principles of *res judicata*, collateral estoppel, release, good faith settlement, judgment bar or reduction or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim.

28. **Stay and Temporary Injunction:** All proceedings in the Action are stayed until further order of this Court, except as may be necessary to implement the Settlement or comply with the terms and conditions of the Stipulation. Pending final determination of whether the Settlement should be approved, the Court bars and enjoins Lead Plaintiffs and all other members of the Class from commencing or prosecuting any and all of the Released Plaintiffs' Claims against any of the Released Defendant Parties in any action or proceeding in any court or tribunal.

29. **Arrangements for Settlement Hearing:** The Court reserves the right to alter the time or the date of the Settlement Hearing or to hold the hearing via video or telephone without further notice to Class Members, and retains jurisdiction to consider all further applications arising out of or connected with the proposed Settlement. The Court may approve the Settlement, with such

modifications as may be agreed to by the Settling Parties, if appropriate, without further notice to the Class.

30. **Taxes:** Lead Counsel are authorized and directed to prepare any tax returns and any other tax reporting form for or in respect to the Settlement Fund, to pay from the Settlement fund any Taxes owed with respect to the Settlement Fund, and to otherwise perform all obligations with respect to Taxes and any reporting or filings in respect thereof without further order of the Court in a manner consistent with the provisions of the Stipulation.

31. **Termination of the Settlement:** If the Settlement is terminated as provided in the Stipulation, the Settlement is not approved, or the Effective Date of the Settlement otherwise fails to occur, this Order shall be vacated, rendered null and void, and be of no further force and effect, except as otherwise provided by the Stipulation, and this Order shall be without prejudice to the rights of the Lead Plaintiffs, the other Class Members, and the Defendants, and the Settling Parties shall revert to their respective positions in the Action on August 26, 2022, as provided in the Stipulation.

IT IS SO ORDERED.

DATED: February 3, 2023

THE HONORABLE ALLYNE R. ROSS
UNITED STATES DISTRICT JUDGE