

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

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

**MEMORANDUM OF LAW IN SUPPORT  
OF MOTION OF A. MAJEED QASIM  
FOR CONSOLIDATION OF RELATED  
ACTIONS, APPOINTMENT AS LEAD  
PLAINTIFF, AND APPROVAL OF LEAD  
COUNSEL**

JAMES GOWEN, 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-02758-ARR-ARL

ANTHONY BAILEY, Individually and on  
Behalf of All Others Similarly Situated,

Plaintiff,

v.

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

Defendants.

Case No. 2:20-cv-02961-ARR-ARL

A. Majeed Qasim (“Movant”), as trustee of the A. Majeed Qasim Revocable Living Trust, respectfully submits this memorandum of law in support of his motion pursuant to the Federal Rules of Civil Procedure and the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4, *et seq.* (the “PSLRA”) for an Order: (1) consolidating the above-captioned related actions; (2) appointing Movant as Lead Plaintiff under 15 U.S.C. § 78u-4(a)(3)(B); (3) approving Movant’s selection of Glancy Prongay & Murray LLP as Lead Counsel pursuant to 15 U.S.C. § 78u-4(a)(3)(B)(v); and (4) granting such other relief as the Court may deem to be just and proper (the “Motion”).

## **I. PRELIMINARY STATEMENT**

This is a class action on behalf of persons who purchased or otherwise acquired Chembio Diagnostics, Inc. (“Chembio” or the “Company”) securities between March 12, 2020 and June 16, 2020, inclusive (the “Class Period”).

Pursuant to the PSLRA, the person or group of persons with the largest financial interest in the relief sought by the class who satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure is presumed to be the “most adequate plaintiff” – the plaintiff most capable of adequately representing the interests of class members. The PSLRA provides that the Court shall appoint the most adequate plaintiff as lead plaintiff.

Movant believes that he is the “most adequate plaintiff” as defined by the PSLRA and should be appointed as lead plaintiff based on his financial losses suffered as a result of defendants’ wrongful conduct as alleged in this action. In addition, for purposes of this motion, Movant satisfies the relevant requirements of Rule 23 of the Federal Rules of Civil Procedure, as his claims are typical of other class members’ claims and he is committed to fairly and adequately representing the interests of the class. Thus, pursuant to the PSLRA’s lead plaintiff provision,

Movant respectfully submits that he is presumptively the most adequate plaintiff and should be appointed as lead plaintiff for the class.

Additionally, Movant's selection of Glancy Prongay & Murray LLP as lead counsel for the Class should be approved because the firm has substantial expertise in securities class actions, and the experience and resources to efficiently prosecute this action.

## **II. FACTUAL BACKGROUND**

Chembio develops diagnostic solutions for the treatment, detection, and diagnosis of infectious diseases. The Company claims to have developed and patented a technology called Dual Path Platform ("DPP"), which allows for rapid diagnostic testing of a variety of chemical substances.

On June 16, 2020, after the market closed, the U.S. Food and Drug Administration ("FDA") announced that it had revoked Chembio's Emergency Use Authorization for the Company's DPP COVID-19 Test "due to performance concerns with the accuracy of the test." Specifically, the FDA stated 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."

The next day, the Company acknowledged receipt of the FDA's letter.

On this news, the Company's share price fell \$6.04, or over 60%, to close at \$3.89 per share on June 17, 2020, on unusually heavy trading volume.

Throughout the Class Period, Defendants made materially false and/or misleading statements, as well as failed to disclose material adverse facts concerning the Company's business, operations, and prospects. Specifically, Defendants failed to disclose to investors: (1) that Chembio's DPP COVID-19 test did not provide high-quality results and there were material performance concerns with the accuracy of the test; (2) that the Company's DPP COVID-19 test generates a higher than expected rate of false results and higher than that reflected in the authorized

labeling for the device, and was not effective in detecting antibodies against COVID-19; (3) that, accordingly, it was not reasonable to believe that the test may be effective in detecting antibodies against COVID-19 and, as a result, there was a material risk to public health from the false test results; (4) that the foregoing, once revealed, was foreseeably likely to have a material negative impact on the Company's financial results and reputation; and (5) that, as a result of the foregoing, Defendants' positive statements about the Company's business, operations, and prospects were materially misleading and/or lacked a reasonable basis.

### **III. PROCEDURAL BACKGROUND**

On June 18, 2020, plaintiff Sergey Chernysh commenced a securities class action lawsuit in this District against Chembio and certain of its officers, captioned *Chernysh v. Chembio Diagnostics, Inc., et al.*, Case No. 2:20-cv-02706 (the "*Chernysh Action*"). The *Chernysh Action* is brought on behalf of persons and entities that purchased Chembio common stock between April 1, 2020 and June 16, 2020, inclusive, and alleges claims against Richard L. Eberly, Chembio's Chief Executive Officer, and Gail S. Page, the executive chair of the Company's Board of Directors.

On June 22, 2020, plaintiff James Gowen commenced a substantially similar action in this District against Chembio and certain of its officers, captioned *Gowen v. Chembio Diagnostics, Inc., et al.*, Case No. 2:20-cv-02758 (the "*Gowen Action*"). The *Gowen Action* is brought on behalf of persons and entities that purchased Chembio common stock between March 12, 2020 and June 16, 2020, inclusive, and alleges claims against the same defendants as the *Chernysh Action*.

On July 3, 2020, plaintiff Anthony Bailey commenced a substantially similar action in this District against Chembio and certain of its officers, captioned *Bailey v. Chembio Diagnostics, Inc., et al.*, Case No. 2:20-cv-02961 (the "*Bailey Action*," and together with the *Chernysh* and *Gowen* Actions, the "Related Actions"). The *Bailey Action* is brought on behalf of persons and entities

that purchased or otherwise acquired Chembio securities between April 1, 2020 and June 16, 2020. In addition to the defendants named in the other actions, the *Bailey* Action alleges claims against Neil A. Goldman, the Company's Chief Financial Officer.

#### **IV. ARGUMENT**

##### **A. The Related Actions Should Be Consolidated**

Consolidation pursuant to Federal Rule of Civil Procedure 42(a) is proper when actions involve common questions of law and fact. *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1284 (2d Cir. 1990).

Each of the Related Actions presents similar factual and legal issues, as they all involve the same subject matter and present the same legal issues. Each action alleges violations of the Exchange Act, each presents the same or similar theories for recovery, and each is based on the same allegedly wrongful course of conduct. Because these actions arise from the same facts and circumstances and involve the same subject matter, consolidation of these cases under Federal Rule of Civil Procedure 42(a) is appropriate. *See Pipefitters Local No. 636 Defined Ben Plan v. Bank of America Corp.*, 275 F.R.D. 187, 192 (S.D.N.Y. 2011) (Consolidation is appropriate "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.").

##### **B. Movant Should Be Appointed Lead Plaintiff**

The PSLRA provides the procedure for selecting a lead plaintiff in class actions brought under the federal securities laws. The PSLRA directs courts to consider any motion to serve as lead plaintiff filed by class members in response to a published notice of class action by the later of (i) 90 days after the date of publication of the notice; or (ii) as soon as practicable after the Court decides any pending motion to consolidate. 15 U.S.C. § 78u-4(a)(3)(B). The PSLRA provides a

“rebuttable presumption” that the “most adequate plaintiff”—*i.e.*, the plaintiff most capable of adequately representing the interests of the Class—is the class member 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)(I).

The presumption in favor of appointing a movant as lead plaintiff may be rebutted only upon proof “by a purported member of the plaintiff class” that the presumptively most adequate plaintiff:

- (aa) will not fairly and adequately protect the interest of the class; or
- (bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class.

15 U.S.C. § 78u-4(a)(3)(B)(iii)(II).

As set forth below, Movant satisfies all of the PSLRA criteria and has complied with all of the PSLRA’s requirements for appointment as lead plaintiff. Movant has, to the best of his knowledge, the largest financial interest in this litigation and meets the relevant requirements of Federal Rule of Civil Procedure 23. In addition, Movant is not aware of any unique defenses Defendants could raise against him that would render him inadequate to represent the Class. Accordingly, Movant respectfully submits that he should be appointed lead plaintiff. *See Varghese v. China Shenghuo Pharm. Holdings, Inc.*, 589 F. Supp. 2d 388, 397 (S.D.N.Y. 2008).

### **1. Movant Filed a Timely Motion**

Movant has made a timely motion in response to a PSLRA early notice. On June 18, 2020, pursuant to Section 21D(a)(3)(A)(I) of the PSLRA, notice was published in connection with this

action. *See* Declaration of Gregory B. Linkh (“Linkh Decl.”), Ex. A. Therefore, Movant had sixty days (until August 17, 2020) to file a motion to be appointed as lead plaintiff. As the trustee of A. Majeed Qasim Revocable Living Trust, a purchaser of Chembio securities during the Class Period, Movant is a member of the proposed class and has hereby timely filed a motion for appointment as lead plaintiff within sixty days of the notice, in compliance with the PSLRA. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(aa).

Additionally, as set forth in the attached certification, Movant attests that he has reviewed the complaint, adopts the allegations therein, and is willing to serve as a representative of the class. *See* Linkh Decl., Ex. B. Accordingly Movant satisfies the first requirement to serve as lead plaintiff for the class.

## **2. Movant Has the Largest Financial Interest**

The PSLRA requires a court to adopt the rebuttable presumption that “the most adequate plaintiff . . . is the person or group of persons that . . . has the largest financial interest in the relief sought by the class.” 15 U.S.C. § 78u-4(a)(3)(B)(iii). At the time of this filing, Movant believes that he has the largest financial interest among Class members who filed timely applications for appointment as lead plaintiff and are presumed to be the “most adequate plaintiff.”

Movant purchased Chembio securities during the Class Period at prices alleged to be artificially inflated by Defendants’ misstatements and omissions and, as a result, suffered financial harm. *See* Linkh Decl., Ex. C. To the best of his knowledge, Movant is not aware of any other Class member that has filed a motion for appointment as lead plaintiff who claims a larger financial interest. As such, Movant believes he has the “largest financial interest in the relief sought by the Class,” and thus satisfies the second PSLRA requirement to be appointed as lead plaintiff for the Class. *See Varghese*, 589 F. Supp. 2d at 396.

**3. Movant Satisfies the Requirements of Rule 23 of the Federal Rules of Civil Procedure**

The PSLRA further provides that in addition to possessing the largest financial interest in the outcome of the litigation, a lead plaintiff must “otherwise satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure.” See *In re Cendant Corp. Litig.*, 264 F.3d 201, 263 (3d Cir. 2001). Rule 23(a) generally provides that a class action may proceed if the following four requirements are satisfied:

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interest of the class.

Fed. R. Civ. P. 23(a).

In making its determination that a lead plaintiff candidate otherwise satisfies the requirements of Rule 23, “typicality and adequacy of representation are the only provisions [of Rule 23] relevant to the determination.” *City of Monroe Employees’ Ret. Sys. v. Hartford Fin. Svcs. Group, Inc.* 269 F.R.D. 291, 296 (S.D.N.Y. 2010). At the lead plaintiff stage of the litigation, a movant need only make a preliminary showing that they satisfy Rule 23’s typicality and adequacy requirements. *Id.* at 296-97 (citing *In re eSpeed, Inc. Sec. Litig.*, 232 F.R.D. 95, 102 (S.D.N.Y. 2005); *Kuriakose v. Federal Home Loan Mortg. Co.*, No. 1:08-cv-7281 (JFK), 2008 WL 4974839, at \*5 (S.D.N.Y. Nov. 24, 2008).

**a) Movant’s Claims Are Typical**

The Rule 23(a) typicality requirement is satisfied when a plaintiff’s claims arise from the same event, practice or course of conduct that gives rise to other class members’ claims, and plaintiff’s claims are based on the same legal theory. See *Kuriakose*, 2008 WL 4974839, at \*4. Rule 23 does not require the lead plaintiff to be identically situated with all class members. *Id.*

Movant's claims are typical of the claims asserted by the proposed members of the Class. Like all members of the Class, Movant alleges that Defendants' material misstatements and omissions concerning Chembio's business, operations, and financial prospects violated the federal securities laws. Movant, like all members of the Class, purchased Chembio securities in reliance on Defendants' alleged misstatements and omissions and were damaged thereby. Accordingly, Movant's interests and claims are "typical" of the interests and claims of the Class.

**b) Movant Is an Adequate Representative**

"The adequacy requirement is satisfied where: (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." *City of Monroe*, 269 F.R.D. at 297.

Movant has demonstrated his adequacy by retaining competent and experienced counsel with the resources and expertise to efficiently prosecute this action, and his financial losses ensure that he has sufficient incentive to provide vigorous advocacy. *See* Linkh Decl., Ex. C. Qasim is a retired Doctor of Physical Therapy who owned a nationwide medical and allied health services staffing company for over 20 years. He has been managing his own portfolio for over 20 years. Movant is not aware of any conflict between his claims and those asserted on behalf of the Class. As such, Movant is well-equipped to represent the class.

**C. The Court Should Approve Lead Plaintiff's Choice of Counsel**

The PSLRA vests authority in the lead plaintiff to select and retain counsel, subject only to approval of the Court. *See* 15 U.S.C. § 78u-4(a)(3)(B)(v); *In re Cendant Corp.*, 264 F.3d at 274. Thus, the Court should not disturb the lead plaintiff's choice of counsel unless necessary to "protect the interests of the class." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II)(aa). Here, Movant has retained Glancy Prongay & Murray LLP as lead counsel to pursue this litigation on his behalf and will

retain the firm as the Class's lead counsel in the event he is appointed lead plaintiff. Glancy Prongay & Murray LLP possesses extensive experience in securities class actions and has successfully prosecuted numerous securities fraud class actions on behalf of injured investors, as reflected by the firm's résumé attached to the Linkh Declaration as Exhibit D. Thus, the Court may be assured that, by granting the Motion, the Class will receive the highest caliber of legal representation.

**V. CONCLUSION**

For the foregoing reasons, A. Majeed Qasim respectfully requests that the Court grant his Motion and enter an Order (1) consolidating the Related Actions; (2) appointing Movant as Lead Plaintiff; (3) approving Movant's selection of Glancy Prongay & Murray LLP as Lead Counsel for the Class; and (4) granting such other relief as the Court may deem just and proper.

Respectfully submitted,

DATED: August 17, 2020

**GLANCY PRONGAY & MURRAY LLP**

By: /s/ Gregory B. Linkh  
Gregory B. Linkh (GL-0477)  
230 Park Ave., Suite 530  
New York, NY 10169  
Telephone: (212) 682-5340  
Facsimile: (212) 884-0988  
Email: [glinkh@glancylaw.com](mailto:glinkh@glancylaw.com)

**GLANCY PRONGAY & MURRAY LLP**

Robert V. Prongay  
Charles H. Linehan  
Pavithra Rajesh  
1925 Century Park East, Suite 2100  
Los Angeles, CA 90067  
Telephone: (310) 201-9150  
Facsimile: (310) 201-9160  
Email: [info@glancylaw.com](mailto:info@glancylaw.com)

*Counsel for Movant A. Majeed Qasim and  
Proposed Lead Counsel for the Class*

**LAW OFFICES OF HOWARD G. SMITH**

Howard G. Smith  
3070 Bristol Pike, Suite 112  
Bensalem, PA 19020  
Telephone: (215) 638-4847  
Facsimile: (215) 638-4867

*Additional Counsel*

**PROOF OF SERVICE**

I, the undersigned say:

I am not a party to the above case and am over eighteen years old.

On August 17, 2020, I served true and correct copies of the foregoing document, by posting the document electronically to the ECF website of the United States District Court for the Eastern District of New York, for receipt electronically by the parties listed on the Court's Service List.

I affirm under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on August 17, 2020, at New York, New York.

/s/ Gregory B. Linkh  
Gregory B. Linkh