UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

In re CHEMED CORP. SECURITIES LITIGATION	No. 1:12-cv-00028-MRB
	CLASS ACTION
This Document Relates To:	Judge Michael R. Barrett
ALL ACTIONS.	

JOINT DECLARATION OF JONATHAN GARDNER AND EVAN J. KAUFMAN IN SUPPORT OF LEAD PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION OF SETTLEMENT PROCEEDS AND CO-LEAD COUNSEL'S MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES

We, JONATHAN GARDNER and EVAN J. KAUFMAN, declare as follows pursuant to 28 U.S.C. §1746:

1. We are partners of the law firms of Labaton Sucharow LLP ("Labaton Sucharow") and Robbins Geller Rudman & Dowd LLP ("Robbins Geller"), respectively, and are admitted *pro hac vice* to practice before this Court.[1] Labaton Sucharow and Robbins Geller are the court-appointed Co-Lead Counsel for Lead Plaintiffs Electrical Workers Pension Fund, Local 103, I.B.E.W. ("Local 103") and Greater Pennsylvania Carpenters Pension Fund ("Greater Pennsylvania") (collectively, the "Lead Plaintiffs") and the proposed Settlement Class in this securities class action (the "Action"). We have been actively involved in the prosecution of the Action, are familiar with its proceedings, and have personal knowledge of the matters set forth herein based upon our close supervision and active participation in the Action. If called as witnesses, we could and would testify competently thereto.

2. This declaration sets forth the background of the Action, the nature of the claims asserted, its procedural history, the legal services provided by Co-Lead Counsel, and the negotiations that led to the proposed Settlement with Chemed Corporation ("Chemed" or the "Company"), Kevin McNamara, David Williams and Timothy O'Toole (collectively, with Chemed, "Defendants"). This declaration demonstrates why the Settlement and Plan of Allocation are fair, reasonable, and adequate and should be approved by the Court, and why the application for attorneys' fees and expenses is reasonable and should likewise be approved by the Court.

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[1] All capitalized terms not otherwise defined herein have the same meanings as set forth in the Stipulation and Agreement of Settlement, dated February 6, 2014 (the "Stipulation"). Dkt. No. 56. Citations to "Ex.___" herein refer to exhibits to this declaration. For clarity, exhibits that themselves have attached exhibits will be referenced as "Ex. __-__." The first numerical reference refers to the designation of the entire exhibit attached hereto and the second reference refers to the exhibit designation within the exhibit itself.

3. The Settlement will resolve all claims asserted in the Action against Defendants on behalf of a class that consists of: all persons or entities that purchased or otherwise acquired Chemed capital stock during the period from February 15, 2010, through May 2, 2013, inclusive, and who were damaged thereby (the "Settlement Class").[2] The Court preliminarily approved the Settlement by Order entered March 27, 2014 (the "Preliminary Approval Order") (Dkt. No. 57). To date, there have been no objections and one request for exclusion.

I. PRELIMINARY STATEMENT

4. After approximately two years of vigorously contested litigation, Lead Plaintiffs have succeeded in obtaining a recovery for the Settlement Class in the amount of $6 million for the benefit of the Settlement Class. As set forth in the Stipulation, in exchange for the Settlement Amount, the proposed Settlement resolves all claims asserted, or that could have been asserted, by Lead Plaintiffs and the Settlement Class against the Defendants.

5. The Settlement provides a favorable result for the Settlement Class, which faced the genuine possibility of a much smaller recovery or no recovery at all had the case continued to be litigated. Lead Plaintiffs' expert has estimated, based on certain assumptions and modeling, that the Settlement Class sustained aggregate maximum damages in the range of approximately $42 to $52 million. Measured against this yardstick, the Settlement recovers approximately 11.5% to 14% of the estimated maximum losses – a substantial recovery in light of the countervailing legal arguments and litigation risks. This recovery is well within the range of recoveries approved by courts

[2] Excluded from the Settlement Class are: (i) the Defendants; (ii) the officers and directors of Chemed, at any point during the Class Period; (iii) members of the immediate family of each of the Individual Defendants and the officers and directors of Chemed, at any point during the Class Period; (iv) any entity in which Defendants have or had a controlling interest; and (v) the legal representatives, heirs, predecessors, successors or assigns of any such excluded party. Also excluded from the Settlement Class are any putative Settlement Class Members who validly exclude themselves from the Settlement Class by timely filing a request for exclusion in accordance with the requirements set forth in the Preliminary Approval Order and the Notice.

nationwide. *See, e.g.*, *In re Fannie Mae Sec., Derivative, and ERISA Litig.*, No. 04–1639, 2013 U.S. Dist. LEXIS 172231, at *29-*30 (D.D.C. Dec. 6, 2013) (approving settlement amounting to 4–8% of the "best case scenario" potential recovery and noting that such percentage "compares favorably with other cases approving securities class action settlements"); *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1042 (N.D. Cal. 2007) ($13.75 million settlement yielding 6% of potential damages after deducting fees and costs was "higher than the median percentage of investor losses recovered in recent shareholder class action settlements"); *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, No. 02 MDL 1484 (JFK), 2007 U.S. Dist. LEXIS 9450, at *33 (S.D.N.Y. Feb. 1, 2007) ("The settlement . . . represents a recovery of approximately 6.25% of estimated damages. This is at the higher end of the range of reasonableness of recovery in class actions securities litigations."). Furthermore, the Settlement Amount of $6 million is well within the median reported settlement amounts since the passage of the PSLRA, which have ranged from $3.7 million in 1996 to $9.1 million in 2013. *See* Dr. Renzo Comolli and Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2013 Full-Year Review* (NERA Jan. 21, 2014) (Ex. 1 hereto) at 28.

6. The proposed Settlement was reached only after arm's-length settlement discussions, including a mediation session conducted under the auspices of the Honorable Stephen P. Lamb (Ret.), a former Vice Chancellor of the Delaware Court of Chancery, who has substantial experience and expertise in the mediation of complex class actions.

7. Before agreeing to the Settlement, Co-Lead Counsel conducted an extensive investigation into the events underlying the claims, filed a detailed and thorough Amended Complaint (the "First Amended Complaint" or "FAC"), fully briefed Defendants' motion to dismiss the FAC, moved to file a proposed second amended complaint to add substantial new factual allegations, and fully briefed Lead Plaintiffs' motion for leave to file the proposed second amended complaint.

8. Co-Lead Counsel carefully analyzed the facts adduced during their investigation, which included, among other things, reviewing and analyzing: (i) publicly available information concerning Chemed and its business segment Vitas Healthcare Corp. ("VITAS"), including press releases, news articles, and other public statements; (ii) research reports issued by financial analysts concerning Chemed and VITAS; (iii) information concerning the investigation of the Company conducted by the U.S. Department of Justice ("DOJ") into allegations of Medicare fraud; (iv) pleadings filed in numerous *qui tam* actions against the Company concerning similar allegations;[3] (v) Medicare rules and regulations applicable to the hospice industry; and (vi) the applicable laws governing the claims and potential defenses. Co-Lead Counsel consulted with experts on the hospice care industry, Medicare reimbursements practices, as well as damages and causation issues. Co-Lead Counsel identified and interviewed more than one hundred potential witnesses, twenty of whose accounts were included in the complaints filed by Lead Plaintiffs.

9. Thus, at the time Settlement was reached, Lead Plaintiffs and Co-Lead Counsel had a well-founded understanding of the strengths and weaknesses of the claims and defenses, honed through their investigation, consultation with experts, and briefing on the motion to dismiss.

10. The Settlement has the full support of Lead Plaintiffs. *See* Declaration of Michael P. Donovan, Chief Financial Officer for Electrical Workers Pension Fund, Local 103, I.B.E.W. in Support of (I) Motion for Final Approval of Class Action Settlement and Plan of Allocation and (II) Motion for Attorneys' Fees and Payment of Litigation Expenses ("Donovan Decl.") (attached hereto as Ex. 2) and Declaration of James Klein in Support of Lead Plaintiffs' Motion for Final Approval of

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[3] These actions are: *United States v. Vitas Hospice Services LLC et al.*, No. 4:13-cv-00449; *United States ex rel. Gonzlaes v. Vitas Healthcare Corp. et al.*, No. 4:13-cv-00344; *United States ex rel. Urick v. Vitas HME Solutions Inc., et al.*, No. 4:13-cv-000563; and *United States ex rel. Spottiswood v. Chemed Corp. et al.*, No. 4:13-cv-00505, all in the U.S. District Court for the Western District of Missouri.

Proposed Class Action Settlement and Plan of Allocation and Co-Lead Counsel's Motion for Award of Attorneys' Fees and Payment of Litigation Expenses ("Klein Decl.") (attached hereto as Ex. 3).

II. SUMMARY OF LEAD PLAINTIFFS' CLAIMS

11. Lead Plaintiffs' claims are set forth in the Second Amended Complaint, filed on March 28, 2014 (the "SAC") (Dkt. No. 58).[4] The SAC asserts claims against Defendants for violations of the federal securities laws, specifically Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5 promulgated thereunder. ¶¶1, 235-59.[5]

12. Lead Plaintiffs' claims arise from Defendants' allegedly false and misleading statements and omissions during the Class Period regarding the driving force behind Chemed's improved financial performance and its compliance with Medicare rules and regulations. ¶¶134-37. Lead Plaintiffs alleged that Defendants, through the Company's business segment VITAS, knowingly enrolled and admitted ineligible, non-terminally ill patients into its hospice care program and improperly billed Medicare for these inappropriately admitted patients. ¶¶66-68. Chemed is alleged to have accomplished this by: (i) failing to properly train and teach employees the requirements for hospice Medicare coverage (¶¶68-72); (ii) pressuring admission nurses to admit non-terminally ill patients (¶¶73-93); (iii) pressuring hospice marketers to push for inappropriate admissions (¶¶94-106); and (iv) engaging in inappropriate relationships with nursing homes and

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[4] Lead Plaintiffs filed the FAC on June 18, 2012 (Dkt. No. 34). Subsequently, on June 7, 2013, Lead Plaintiffs moved this Court for leave to file a proposed second amended complaint that included new factual allegations. Dkt. No. 47. The Action settled while the motion to amend was pending. As part of the Settlement, Lead Plaintiffs sought leave to file an enhanced second amended complaint which, among other things, expanded the Class Period to February 15, 2010 through May 2, 2013. Dkt. No. 56 at 25. On March 27, 2014, the Court granted preliminary approval of the Settlement, which included granting leave to file the SAC, deeming it the "operative complaint." Dkt. No. 57 at 1-2.

[5] Unless otherwise noted, all references herein to "¶__" refer to paragraph cites of the SAC.

doctors (¶¶125-27). These tactics allegedly resulted in inappropriate admissions to VITAS' hospice care and improper Medicare billing. ¶¶107-124.

13. Lead Plaintiffs alleged that as a result of the Medicare violations and the subsequent announcement of a DOJ investigation and lawsuit concerning alleged Medicare fraud, and several related whistleblower actions concerning those alleged violations, the Company's stock price collapsed from more than $80.68 at the height of the Class Period to $68.00 at the close of trading on May 3, 2013. ¶¶11, 223-28.

III. PROCEDURAL HISTORY

A. The Initial Complaint and Appointment of Lead Plaintiffs

14. This Action was commenced on January 12, 2012 by the filing of an initial complaint alleging violations of the federal securities laws. Dkt. No. 1.

15. On March 12, 2012, Local 103 and Greater Pennsylvania moved for appointment as lead plaintiffs and requested that their counsel, Labaton Sucharow and Robbins Geller, be appointed Co-Lead Counsel, and Goldenberg Schneider be appointed as Liaison Counsel for the class. Dkt. No. 11.

16. On April 9, 2012, the Court appointed Local 103 and Greater Pennsylvania as Lead Plaintiffs and approved their selection of Labaton Sucharow and Robbins Geller as Co-Lead Counsel and Goldenberg Schneider as Liaison Counsel for the class. Dkt. No. 29.

B. The Investigation

17. The Complaints in this Action were the result of a rigorous investigation. Co-Lead Counsel undertook, among other things, a review and analysis of: (i) documents filed publicly by Chemed with the SEC; (ii) press releases, news articles, and other public statements issued by or concerning Chemed and Defendants; (iii) research reports issued by financial analysts concerning Chemed; (iv) publicly available information concerning the investigation conducted by the DOJ; (v)

pleadings filed in other *qui tam* litigation involving certain Defendants; and (vi) the applicable laws governing the claims and potential defenses.

18. Co-Lead Counsel's investigation also included identifying and interviewing former Company employees and others with knowledge. Investigators identified and interviewed more than one hundred former employees who had worked at dozens of VITAS' hospice programs and in-patient units across the country. Co-Lead Counsel continued the investigation after the FAC was filed and added additional, significant factual detail to the proposed second amended complaint based on their efforts.

19. In addition, Co-Lead Counsel consulted with several experts in the areas of Medicare billing regulations, the hospice care industry, damages, and causation in connection with the formulation of their claims in the Complaints.

C. The First Amended Complaint

20. On June 18, 2012, Lead Plaintiffs filed the FAC against Chemed and the Individual Defendants. Dkt. No. 34, FAC, ¶¶1, 16. The securities fraud claims arose from the Company's issuance of allegedly false and misleading statements regarding the reasons for the Company's improved financial performance and Chemed's compliance with Medicare rules and regulations. *Id.*, ¶¶1-10.

21. In particular, Lead Plaintiffs alleged that Defendants made positive statements about the financial performance of Chemed's VITAS unit and the Company's compliance with Medicare rules and regulations that govern the VITAS segment, but failed to disclose that VITAS achieved those positive results in large part by systematically enrolling and admitting ineligible, non-terminally ill patients into its hospice care program. *Id.*, ¶¶59-78.

22. The FAC further alleged that these false and misleading statements caused Chemed's capital stock to trade at artificially inflated prices and the Individual Defendants sold over $6 million

worth of Chemed shares during the Class Period and reaped additional rewards through the Company's Executive Long-Term Incentive Plan. *Id.*, ¶¶135-40. Lead Plaintiffs alleged that when details of Defendants' alleged scheme to defraud Medicare and Medicaid, by falsifying records and hospice certifications, were revealed to the market on November 16, 2011, Chemed's stock price dropped from $57.52 to $50.65 per share. *Id.*, ¶¶141-45.

D. The Motion to Dismiss

23. Defendants filed a motion to dismiss the FAC on August 17, 2012. Dkt. No. 39. Defendants argued, *inter alia*, that Lead Plaintiffs': (i) allegations did not demonstrate the requisite scienter (*i.e.*, Lead Plaintiffs could not tie the alleged conduct at the hospital level to the corporate executives); (ii) failed to show the falsity of any alleged statements concerning the Company's compliance with Medicare rules or its financial results (*i.e.*, the statements concerning compliance with Medicare regulations were "soft" information, not actionable by the securities laws, and its financial reports, including daily patient census, was accurate); (iii) failed to adequately plead loss causation (*i.e.*, the stock price did not drop when the first *qui tam* complaint was published – the stock price dropped over a week later when a *Bloomberg* article referenced the *qui tam* complaint, and moreover, the announcement of a government investigation could not serve as the basis for loss causation); and (iv) failed to establish the existence of a fraudulent scheme to inappropriately admit hospice patients to VITAS (*i.e.*, hospice admissions were medical determinations, subjective in nature, and Lead Plaintiffs could not prove that any patient was intentionally and inappropriately admitted).

24. On October 16, 2012, Lead Plaintiffs filed their opposition to Defendants' motion to dismiss (Dkt. No. 40), addressing in detail each of the arguments raised by Defendants, and on November 26, 2012, Defendants filed a reply brief in further support of their motion to dismiss (Dkt. No. 43).

E. Lead Plaintiffs' Motion to File a Proposed Further Amended Pleading

25. On May 2, 2013, while the motion to dismiss the FAC was fully briefed and pending, the DOJ filed a complaint in the United States District Court for the Western District of Missouri, Western Division, titled *United States v. Vitas Hospice Services, L.L.C., et al.*, No. 4:13-cv-00449-BCW (the "DOJ Complaint"), against Chemed and its subsidiaries alleging the same fraudulent scheme detailed in the FAC. The DOJ Complaint alleged that Chemed knowingly presented Medicare with false or fraudulent claims. DOJ Complaint, ¶¶1, 9, 242-53.

26. Lead Plaintiffs sought to amend the FAC to incorporate certain information detailed in the DOJ Complaint. On June 7, 2013, Lead Plaintiffs filed a motion for leave to file a proposed further amended pleading, attaching the proposed pleading, which contained facts from the DOJ Complaint and additional information gathered during Co-Lead Counsel's ongoing investigation, including additional accounts by former VITAS employees. The new allegations related to 20 confidential witnesses from 19 VITAS locations and added nearly 40 additional pages of detailed assertions.

27. On July 1, 2013, Defendants filed an opposition to Lead Plaintiffs' motion for leave to amend the FAC. Dkt. No. 48. On July 18, 2013, Lead Plaintiffs filed their reply in further support of their motion. Dkt. No. 49.

28. The Action settled while the motion to amend was pending before this Court.

IV. SETTLEMENT NEGOTIATIONS

29. The negotiations that produced this Settlement were substantial and were always conducted at arm's length. Following the filing of Lead Plaintiffs' motion for leave to amend and related briefs, the parties agreed to mediate in an attempt to settle the claims.

30. On September 16, 2013, the parties participated in a mediation before Stephen P. Lamb (Ret.), former Vice Chancellor of the Delaware Court of Chancery. Prior to the mediation,

Co-Lead Counsel provided Vice Chancellor Lamb with extensive material, including a mediation statement. As a result of this full day mediation, the parties reached an agreement-in-principle to resolve this litigation for $6 million, subject to execution of final documentation. The Settling Parties then extensively negotiated and memorialized the final terms of settlement in the Stipulation, which was filed with the Court on February 6, 2014. Dkt. No. 56.

V. RISKS OF CONTINUED LITIGATION

31. Based on publicly available documents and information obtained through their own investigation, the DOJ investigation, the *qui tam* filings, and discussions with expert consultants in the fields of damages and Medicare regulation, Co-Lead Counsel believe that there was support for the allegations asserted in the Action. Co-Lead Counsel also realize, however, that Lead Plaintiffs faced considerable risks and obstacles to achieving a recovery, were the case to continue. Lead Plaintiffs and Co-Lead Counsel carefully considered the challenges posed in the Action during the months leading up to the Settlement and during the settlement discussions with Defendants.

A. Risks Concerning Liability of Defendants

32. Although Lead Plaintiffs believe in the merit of the claims asserted against Defendants, securities fraud claims are known to be difficult and complex to litigate and the facts here also presented significant challenges, given, among other things, the vigorous opposition advanced by Defendants.

1. Risks Inherent in Proving a False Scheme

33. Defendants would have argued, as they did in their motion to dismiss, that Lead Plaintiffs failed to allege the existence of a scheme to inappropriately admit hospice patients. Specifically, Defendants would have argued that Lead Plaintiffs could not prove that a single patient was inappropriately admitted or that Medicare was billed for an inappropriately admitted patient. Hospice care decisions are made by doctors with the input of nursing staff, and these decisions are

inherently subjective. It would have been difficult to prove that decisions to admit certain patients to hospice care were not legitimately based. Moreover, during the Class Period, Chemed operated over 100 hospice locations in 16 states. Lead Plaintiffs would have had to prove that the scheme was orchestrated by Defendants and was being actively perpetrated throughout VITAS across the country. Lead Plaintiffs would have had to engage medical experts to review numerous patient charts in order to determine if hospice patients were indeed eligible for care and to establish a pattern of inappropriate admissions. This review would have been time consuming and expensive for the class. Moreover, there was a very real risk that a jury would see decisions on patient eligibility as merely a difference of opinion between doctors, and not as a scheme to defraud.

2. Risks Concerning Materiality and Falsity of Statements

34. Defendants would be expected to argue at summary judgment and trial, as they had in their motion to dismiss, that Lead Plaintiffs could not prove falsity and materiality. First, Defendants would argue that their financial results and admissions data were accurate, and that the Company never restated its financial information. Even if Lead Plaintiffs could show that Defendants engaged in a scheme to inappropriately admit hospice patients, Lead Plaintiffs would also have to show that this scheme materially inflated Defendants' financial results and admissions data.

35. Second, Defendants would have argued that their statements of belief as to their compliance with Medicare rules are not actionable. There is conflicting case law in the Circuit Courts as to whether statements of belief are actionable in the absence of proof that the defendants subjectively knew their opinion was false when made.[6] Indeed, on March 3, 2014, the Supreme

[6] *Compare Ind. State Dist. Council of Laborers v. Omnicare, Inc.*, 719 F.3d 498 (6th Cir. 2013) (holding plaintiffs did not need to prove that defendants knew their opinion was false in an action brought under Section 11); with *In re Credit Suisse First Boston Corp. Analyst Reports Sec. Litig.*, 431 F.3d 36, 47 (1st Cir. 2005) (in order to challenge a statement of opinion plaintiffs must plead "facts sufficient to indicate that the speaker did not actually hold the opinion expressed," or in other

Court granted a writ of certiorari in *Ind. State Dist. Council of Laborers v. Omnicare, Inc.*, 583 F.3d 935 (6th Cir. 2009), *cert. granted*, 134 S. Ct. 1490 (2014), to determine this issue. A decision from the Supreme Court that subjective falsity needs to be proven for a statement of opinion would require that Lead Plaintiffs show Defendants actually ***knew*** that their opinion was false at the time it was made.

3. Risks of Proving Scienter

36. Even if Lead Plaintiffs surmounted the challenge of proving a scheme to inappropriately admit patients across VITAS locations, and the materiality and falsity of the alleged misstatements, Lead Plaintiffs would have been required to prove that each of the Defendants acted with scienter – that is, that they knew or were severely reckless in not knowing that their statements were false or misleading when made.

37. VITAS is one of two business segments at Chemed. Lead Plaintiffs would have had to prove that Defendants knew or recklessly disregarded that this business segment was systematically admitting inappropriate hospice patients. Defendants McNamara and Williams were officers of Chemed, not VITAS, so Defendants would have argued that they cannot be charged with direct knowledge of what was occurring on the ground at the 71 hospice programs and 33 in patient units (totaling over 100 locations) in 16 states. While Defendant O'Toole was the CEO of the VITAS segment, Defendants would have argued that no former employee affirmatively tied the

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words, "subjective falsity"); *Fait v. Regions Fin. Corp.*, 655 F.3d 105 (2d Cir. 2011) (proof of subjective falsity necessary in cases brought under Section 11); *Nolte v. Capital One Fin. Corp.*, 390 F.3d 311, 315 (4th Cir. 2004) ("In order to plead that an opinion is a false factual statement . . . the complaint must allege that the opinion expressed was different from the opinion actually held by the speaker."); *Greenberg v. Crossroads Sys., Inc.*, 364 F.3d 657, 670 (5th Cir. 2004) ("statement of belief is only open to objection where the evidence shows that the speaker did not in fact hold that belief and the statement made asserted something false or misleading about the subject matter"); *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1162 (9th Cir. 2009) (fairness opinions "can give rise to a claim under Section 11 only if the complaint alleges with particularity that the statements were both objectively and subjectively false or misleading").

alleged fraud to him (or any other Defendant) or communicated directly with any Defendant concerning the alleged fraud. Moreover, even though Lead Plaintiffs alleged that Defendants had access to the daily patient census, Defendants would have argued that an increase in the census was the result of legitimate business practices.

38. Lead Plaintiffs also argued that Defendants reaped benefits from a Long Term Incentive Plan ("LTIP") tied to hitting certain stock benchmarks and that Defendants sold millions of dollars in stock during the Class Period when the stock was at artificially high prices. Defendants would have argued, as they did in their motion to dismiss, that the stock sales were not out of line with previous sales by Defendants and that any incentives they received from the LTIP would not be sufficient to show scienter as such incentives exist in most corporations.

B. Risks Concerning Loss Causation and Damages

39. Defendants would have vigorously challenged Lead Plaintiffs' ability to establish loss causation and damages. Defendants argued in their motion to dismiss, and would continue to argue at summary judgment and trial, *inter alia*, that Lead Plaintiffs could not establish that the class's losses were caused by the alleged fraud.

40. Defendants would have argued that one of the primary corrective disclosures alleged in this case – the *Bloomberg News* article describing the *Rehfeldt qui tam* action – was published a week after the *Rehfeldt qui tam* action was unsealed to the public, and that Chemed's stock price did not decrease at the time the *Rehfeldt* complaint itself became public. Defendants would also have argued that because *Rehfeldt's* allegations of inappropriate hospice admissions related to a period before 2009, more than a year before the start of the Class Period, the *Rehfeldt* action could not have revealed any misrepresentations of fact during or concerning that period.

41. As to the other alleged corrective disclosure – the announcement of an investigation by the DOJ – Defendants would have argued, as they did in their motion to dismiss, that government

investigations, like allegations in a private suit, do not by themselves indicate anything more than a 'risk' that Defendants engaged in inappropriate conduct, and therefore, such allegations are insufficient to support loss causation.

42. In short, Lead Plaintiffs faced numerous obstacles to proving both liability and damages and there was no certainty, given Defendants' asserted defenses, that Lead Plaintiffs and the class would prevail. Additionally, Defendants would likely appeal any verdict and damage award. The appeals process would likely span several years, during which time class members would have received no distribution on any award. An appeal of any verdict would also carry the risk of reversal, resulting in no recovery for the class. Because of the risks and delays associated with continuing to litigate and proceeding to trial, there was a real danger that any litigated recovery would be much less than the recovery achieved in this Settlement. Therefore, Co-Lead Counsel believe that the Settlement obtained is fair, reasonable, adequate, and in the best interest of Settlement Class Members.

C. Risks Concerning Class Certification

43. Assuming, *arguendo*, that the Court would have ultimately denied Defendants' motion to dismiss the operative complaint, Lead Plaintiffs would have had to successfully move for class certification. This action was settled on September 16, 2013, prior to the Supreme Court granting certiorari in *Halliburton Co. v. Erica P. John Fund, Inc.*, No. 13-317 (U.S. argued Mar. 5, 2014), where the Court will be addressing the continued viability of the fraud-on-the-market presumption of reliance that underpins class certification for securities class actions. Without this Settlement, the class faces uncertainty as to its ability to obtain class certification in the event the fraud-on-the-market presumption is substantially altered by the Supreme Court.

VI. COMPLEXITY, EXPENSE, AND LIKELY DURATION OF THE LITIGATION

44. During the course of the Action, a period of approximately two years, Co-Lead Counsel conducted an extensive investigation, drafted detailed pleadings, engaged in motion practice on Defendants' motion to dismiss and Lead Plaintiffs' motion to amend, and spent many hours preparing for mediation and in negotiations leading to the Settlement. Assuming that the Court would have ultimately denied Defendants' motion to dismiss the SAC, further litigation against Defendants would have likely consumed significant time and resources for document and deposition discovery, expert discovery, class certification, summary judgment proceedings, trial, and likely appeals thereafter.

45. In particular, discovery would have proven to be exceedingly challenging. During the Class Period, VITAS operated over 100 hospice locations. Coordinating and conducting discovery of patient charts and relevant personnel's emails at over 100 locations (plus the corporate office) would have been difficult, time consuming and expensive for the class.

VII. LEAD PLAINTIFFS' COMPLIANCE WITH THE COURT'S PRELIMINARY APPROVAL ORDER AND CLASS REACTION TO DATE

46. Pursuant to the Preliminary Approval Order, the Court appointed Gilardi & Co. LLC ("Gilardi") as Claims Administrator in the Action and instructed Gilardi to disseminate copies of the (1) Notice of Pendency of Class Action and Proposed Settlement, Motion for Attorneys' Fees, and Settlement Hearing, and (2) Proof of Claim (collectively, the "Notice Packet") by mail.

47. The Notice, attached as Ex. A to the Declaration of Carole K. Sylvester Re A) Mailing of the Notice of Pendency of Class Action and Proposed Settlement, Motion for Attorneys' Fees, and Settlement Hearing and the Proof of Claim and Release Form, B) Publication of the Summary Notice, and C) Internet Posting ("Mailing Decl.") (attached as Ex. 4 hereto), provides potential Settlement Class Members with information on the terms of the Settlement and, among

other things: their right to exclude themselves from the Settlement Class; their right to object to any aspect of the Settlement, the Plan of Allocation, or the fee and expense application; and the manner for submitting a Proof of Claim in order to be eligible for a payment from the proceeds of the Settlement. The Notice also informs Settlement Class Members of Co-Lead Counsel's intention to apply for an award of attorneys' fees of no more than 33% of the Settlement Fund and for payment of litigation expenses in an amount not to exceed $200,000.

48. As detailed in the Mailing Declaration, on April 10, 2014, Gilardi began mailing Notice Packets to potential Settlement Class Members, as well as banks, brokerage firms, and other third party nominees whose clients may be Settlement Class Members. Mailing Decl., ¶¶3-4. To disseminate the Notice, Gilardi obtained the names and addresses of potential Settlement Class Members from listings provided by Chemed and its transfer agent and from banks, brokers and other nominees. *Id.* In total, to date, Gilardi has mailed 31,148 Notice Packets to potential nominees and Settlement Class Members by first-class mail, postage prepaid. *Id.*, ¶¶3-10. On April 22, 2014, Gilardi caused the Summary Notice to be published in *Investor's Business Daily* and transmitted over *Business Wire*. *Id.*, ¶14, and Exhibit D to the Mailing Decl.

49. Gilardi also maintains and posts information regarding the Settlement on a dedicated website established for the Action, www.chemedsecuritiessettlement.com, to provide Settlement Class Members with information concerning the Settlement, as well as downloadable copies of the Notice Packet and the Stipulation. *Id.*, ¶12. In addition, Co-Lead Counsel have made relevant documents concerning the Settlement available on their firms' websites.

50. Pursuant to the terms of the Preliminary Approval Order, the deadline for Settlement Class Members to submit objections to the Settlement, the Plan of Allocation, or the fee and expense application, or to request exclusion from the Settlement Class is June 18, 2014. To date, Co-Lead Counsel have not received any objections and the Claims Administrator has received one request for

exclusion from the Settlement Class. *Id.*, ¶13. Should any objections or further requests for exclusion be received, Lead Plaintiffs will address them in their reply papers, which are due July 2, 2014.

VIII. PLAN OF ALLOCATION

51. Pursuant to the Preliminary Approval Order, and as set forth in the Notice, all Settlement Class Members who wish to participate in the distribution of the Settlement proceeds must submit a valid Proof of Claim and all required information postmarked no later than August 8, 2014. As provided in the Notice, after deduction of Court-awarded attorneys' fees and expenses, notice and administration costs, and applicable Taxes, the balance of the Settlement Fund (the "Net Settlement Fund") will be distributed according to the plan of allocation approved by the Court (the "Plan of Allocation").

52. The Plan of Allocation proposed by Lead Plaintiffs, which is set forth in full in the Notice (Ex. 4 – A at 5-7), is designed to achieve an equitable and rational distribution of the Net Settlement Fund to eligible claimants, but it is not a formal damages analysis that would be submitted at trial. Co-Lead Counsel developed the Plan of Allocation in close consultation with Lead Plaintiffs' damages expert and believe that the plan provides a fair and reasonable method to equitably distribute the Net Settlement Fund among Authorized Claimants.

53. The Plan of Allocation provides for distribution of the Net Settlement Fund among Authorized Claimants on a *pro rata* basis based on "Recognized Loss" formulas tied to liability and damages. Lead Plaintiffs' consulting damages expert analyzed the movement of Chemed's capital stock and took into account the portion of the stock drops allegedly attributable to the challenged statements. The Plan of Allocation ensures that the net settlement proceeds will be fairly and equitably distributed based upon the amount of inflation in the price of Chemed's capital stock during the Class Period that was allegedly attributable to the alleged wrongdoing.

54. The Plan of Allocation provides formulas for calculating a claimant's "Recognized Loss" for each acquisition/purchase of Chemed capital stock during the Class Period. Calculation of Recognized Loss will depend upon several factors, including when the Authorized Claimant's Chemed capital stock was purchased during the Class Period and whether the capital stock was sold during the Class Period, and if so, when and at what price.

55. Gilardi, as the Court-approved Claims Administrator, will determine each Authorized Claimant's *pro rata* share of the Net Settlement Fund based upon each Authorized Claimant's total Recognized Loss compared to the aggregate Recognized Losses of all Authorized Claimants, as calculated in accordance with the Plan of Allocation.

56. To date, there have been no objections to the Plan of Allocation and Lead Plaintiffs and Co-Lead Counsel respectfully submit that the Plan of Allocation is fair and reasonable, and should be approved.

IX. CO-LEAD COUNSEL'S APPLICATION FOR ATTORNEYS' FEES

57. In addition to seeking final approval of the Settlement and the Plan of Allocation, Co-Lead Counsel are applying for a fee award of 33% of the Settlement Fund (which includes accrued interest) on behalf of all plaintiffs' counsel that contributed to the prosecution of the Action. This request is fully supported by Lead Plaintiffs. *See* Donovan Decl., ¶¶6-7; Klein Decl., ¶5. Co-Lead Counsel also request payment of expenses incurred in connection with the prosecution of the Action from the Settlement Fund in the amount of $65,628.07, plus accrued interest. This amount is well below the $200,000 maximum expense amount that the Settlement Class was advised could be requested. The legal authorities supporting the requested fees and expenses are set forth in Co-Lead Counsel's separate memorandum of law in support of the fee and expense application. Below is a summary of the primary factual bases for the request.

A. Lead Plaintiffs Support the Fee and Expense Application

58. Lead Plaintiffs are two sophisticated institutional investors. Local 103 is a pension fund maintained by an electrical workers' union headquartered in Eastern Massachusetts with a 100-year history, which manages more than $800 million in assets on behalf of approximately 8,000 participants. *See* Donovan Decl., ¶1. Greater Pennsylvania is a trustee-administered, multi-employer, defined benefit pension plan for carpenters in Pennsylvania that had more than $695 million in assets as of December 1, 2011.

59. Lead Plaintiffs believe the fee and expense request is fair, reasonable, and warrants consideration and approval by the Court. *See* Donovan Decl., ¶¶6-7; Klein Decl., ¶5. In coming to this conclusion, Lead Plaintiffs considered the work conducted, the size of the recovery obtained, and the considerable risks of litigation. *See id.* Lead Plaintiffs take their roles in this representative action seriously in order to ensure that Co-Lead Counsel's fee request is fair in light of the work performed and result achieved for the Settlement Class. *See id.*

B. The Risks and Unique Complexities of the Action

60. The Action presented substantial challenges from the outset of the case. The specific risks Lead Plaintiffs faced in proving Defendants' liability and damages are detailed in paragraphs 32-43, above. These case-specific risks are in addition to the more typical risks accompanying securities class action litigation, such as the fact that this Action was undertaken on a contingent basis.

61. From the outset, Co-Lead Counsel understood that they were embarking on a complex, expensive, risky, and lengthy litigation with no guarantee of ever being compensated for the substantial investment of time and money the case would require. In undertaking this responsibility, Co-Lead Counsel were obligated to ensure that sufficient resources were dedicated to the prosecution of the Action, and that funds were available to compensate staff and to cover the

considerable costs that a case such as this requires. With an average lag time of several years for these cases to conclude, the financial burden on contingent-fee counsel is far greater than on a firm that is paid on an ongoing basis. Indeed, plaintiffs' counsel have received no compensation during the course of the Action and have incurred $65,628.07 in expenses in prosecuting the Action for the benefit of the class (*see* Section C, below, for further detail on counsel's incurred expenses).

62. Co-Lead Counsel also bore the risk that no recovery would be achieved (or that a judgment could not be collected, in whole or in part). Even with the most vigorous and competent of efforts, success in contingent-fee litigation, such as this, is never assured. To the contrary, it takes hard work and diligence by skilled counsel to develop the facts and theories that are needed to sustain a complaint or win at trial, or to convince sophisticated defendants to engage in serious settlement negotiations at meaningful levels.

63. Moreover, courts have repeatedly recognized that it is in the public interest to have experienced and able counsel enforce the securities laws and regulations pertaining to the duties of officers and directors of public companies. If this important public policy is to be carried out, courts should award fees that adequately compensate plaintiffs' counsel, taking into account the risks undertaken in prosecuting a securities class action.

64. Here, Co-Lead Counsel's persistent efforts in the face of substantial risks and uncertainties have resulted in a favorable and immediate recovery for the benefit of the Settlement Class. In circumstances such as these, and in consideration of Co-Lead Counsel's hard work and the very favorable result achieved, the requested fee of 33% of the Settlement Fund and payment of $65,628.07 in expenses is reasonable and should be approved.

C. The Work and Experience of Co-Lead Counsel

65. The work undertaken by Co-Lead Counsel in investigating and prosecuting this case and arriving at the present Settlement in the face of serious hurdles has been time-consuming and

challenging. As more fully set forth above, the Action was prosecuted for approximately two years and settled only after Co-Lead Counsel countered multiple legal and factual challenges. Among other efforts, Co-Lead Counsel conducted a comprehensive investigation into the class's claims; researched and prepared a detailed amended complaint; briefed an extensive opposition to Defendants' motion to dismiss; prepared an even more detailed and extensive proposed second amended complaint upon discovering new facts and evidence; fully briefed a motion to amend; consulted with experts and consultants; and engaged in a hard-fought settlement process with experienced defense counsel.

66. At all times throughout the pendency of the Action, Co-Lead Counsel's efforts were driven and focused on advancing the litigation to bring about the most successful outcome for the class, whether through settlement or trial, by the most efficient means necessary.

67. Attached hereto are declarations from plaintiffs' counsel to support Co-Lead Counsel's request for an award of attorneys' fees and litigation expenses. *See* Declaration of Jonathan Gardner on behalf of Labaton Sucharow LLP, dated June 4, 2014 (Ex. 5 hereto) ("Labaton Fee Decl."); Declaration of Evan J. Kaufman on behalf of Robbins Geller Rudman & Dowd LLP, dated June 4, 2014 (Ex. 6 hereto) ("Robbins Geller Fee Decl."); and Declaration of Jeffrey S. Goldenberg on behalf of Goldenberg Schneider, LPA (Liaison Counsel), dated May 20, 2014 (Ex. 7 hereto).

68. Included within these declarations are charts that summarize the number of hours worked by each attorney and each professional support staff employed by the firms and the value of that time at current billing rates, *i.e.* the "lodestar" of the firms, as well as the expenses incurred by category.[7] As set forth in each declaration, the charts were prepared from contemporaneous daily

[7] Attached hereto as Exhibit 8 is a summary table reporting the lodestars and expenses of counsel.

time records regularly prepared and maintained by the respective firms, which are available at the request of the Court.

69. The hourly billing rates of plaintiffs' counsel here range from $400 to $900 for partners, $690 to $750 for of counsel, and $385 to $690 for other attorneys. *See* Exs. 5-7. It is respectfully submitted that the hourly rates for attorneys and professional support staff included in these schedules are reasonable and customary. Exhibit 9, attached hereto, is a table of billing rates for defense firms compiled by Labaton Sucharow from fee applications submitted by such firms in federal bankruptcy proceedings across the country in 2013. The table indicates, among other things, that the median partner billing rate was $975, the median of counsel rate was $790, and the median associate rate was $595. Similarly, the *National Law Journal's* annual survey of law firm billing rates in 2013 shows that average partner billing rates among the Nation's largest firms ranged from $930 to $1,055 per hour and average associate billing rates ranged from $590 to $670 per hour. *See* www.nationallawjournal.com; Ex. 10 hereto.

70. Counsel have collectively expended more than 4,560 hours in the prosecution and investigation of the Action. *See* Exs. 5-7. The resulting collective lodestar is $2,358,020.25. *Id.* Pursuant to a lodestar "cross-check," the requested fee of 33% of the Settlement Fund (or $1,980,000) results in a negative "multiplier"[8] of approximately 84% of the lodestar, which does not include any time that will necessarily be spent from this date forward administering the Settlement.

71. Co-Lead Counsel are highly experienced in prosecuting securities class actions and worked diligently and efficiently in prosecuting the Action. Labaton Sucharow, as demonstrated by the firm resume attached to its declaration, is among the most experienced and skilled firms in the securities litigation field, and has a long and successful track record in such cases. *See* Labaton Fee

[8] The multiplier is calculated by dividing the $1,980,000 fee request by the $2,358,020.25 lodestar of plaintiffs' counsel.

Decl., Ex. 5-A. Labaton Sucharow has served as lead counsel in a number of high profile matters, for example: *In re Am. Int'l Grp., Inc. Sec. Litig.*, No. 04-8141 (S.D.N.Y.) (representing the Ohio Public Employees Retirement System, State Teachers Retirement System of Ohio, and Ohio Police & Fire Pension Fund and reaching settlements of $1 billion); *In re HealthSouth Corp. Sec. Litig.*, No. 03-15001 (N.D. Ala.) (representing the State of Michigan Employees' Retirement System, New Mexico State Investment Council, and the Educational Retirement Board of New Mexico and securing settlements of more than $600 million); and *In re Countrywide Fin. Corp. Sec. Litig.*, No. 07-5295 (C.D. Cal.) (representing the New York State and New York City Pension Funds and reaching settlements of more than $600 million).

72. Robbins Geller has 200 lawyers in 10 offices nationwide and, in its capacity as lead counsel, has successfully obtained some of the largest recoveries in history including, *In re Enron Corp. Sec. Litig.*, No. H-01-3624 (S.D. Tex.) (the firm represented, among others, Amalgamated Bank, Regents of the University of California, Washington State Investment Board, and San Francisco City and County Employees' Retirement Fund Systems and secured a $7.3 billion recovery, which is the largest ever in a securities class action); *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, MDL No. 1720 (E.D.N.Y.) ($5.7 billion settlement is the largest ever in an antitrust class action); *Jaffe v. Household International, Inc.*, No. 02-C-5893 (N.D. Ill.) ($2.46 billion judgment is the largest ever jury trial verdict in a securities class action); and *In re UnitedHealth Group Inc. PSLRA Litig.*, No. 06-cv-01691 (D. Minn.) (the firm represented California Public Employees' Retirement System and others in recovering $925 million in the largest stock option backdating settlement). *See* Robbins Geller Fee Decl., Ex. 6-A.

D. Standing and Caliber of Defense Counsel

73. The quality of the work performed by Co-Lead Counsel in attaining the Settlement should also be evaluated in light of the quality of the opposition. Defendants are represented by

Cravath, Swaine & Moore LLP, a well-known and respected law firm with attorneys who vigorously represented the interests of their clients. In the face of this experienced, formidable, and well-financed opposition, Co-Lead Counsel was nonetheless able to achieve a settlement very favorable to the Settlement Class.

E. The Reaction of the Settlement Class to the Fee and Expense Application

74. As mentioned above, consistent with the Preliminary Approval Order, more than 31,140 Notice Packets have been mailed to potential Settlement Class Members advising them that Co-Lead Counsel would seek an award of attorneys' fees that would not exceed 33% of the Settlement Fund, and payment of expenses in an amount not greater than $200,000. *See* Mailing Decl. (Ex. 4-A at 2). Additionally, the Summary Notice was published in *Investor's Business Daily*, and disseminated over *Business Wire*. *Id.*, ¶14. The Notice and the Stipulation have also been available on the settlement website maintained by Gilardi. *Id.*, ¶12. While the deadline set by the Court for Settlement Class Members to object to the requested fees and expenses has not yet passed, to date no objections have been received. Co-Lead Counsel will respond to any objections received in their reply papers, which are due July 2, 2014.

X. REQUEST FOR PAYMENT OF LITIGATION EXPENSES

75. Co-Lead Counsel seek, on behalf of plaintiffs' counsel, payment from the Settlement Fund of $65,628.07 in litigation expenses reasonably and necessarily incurred in connection with commencing and prosecuting the claims against Defendants.

76. From the beginning of the case, plaintiffs' counsel were aware that they might not recover any of their expenses, and, at the very least, would not recover anything until the Action was successfully resolved. Thus, counsel were motivated to take steps to minimize expenses whenever practicable without jeopardizing the vigorous and efficient prosecution of the case.

77. As set forth in the fee and expense schedules, plaintiffs' counsel have incurred a total of $65,628.07 in litigation expenses in connection with the prosecution of the Action. As attested to, these expenses are reflected on the books and records maintained by each firm. These books and records are prepared from expense vouchers, check records, and other source materials and are an accurate record of the expenses incurred. These expenses are set forth in detail in each firm's declaration, which identifies the specific category of expense—*e.g.*, online/computer research, experts' fees, travel costs, duplicating, telephone, fax and postage expenses, and other costs incurred for which counsel seek payment. These expense items are billed separately and such charges are not duplicated in the respective firms' billing rates.

78. Of the total amount of expenses, $25,039.76, or more than 38%, was expended on experts and consultants. Early in the litigation, Co-Lead Counsel retained consultants in the areas of Medicare reimbursement, hospice care, damages, and loss causation to assist in drafting the detailed and extensive complaints and investigating the claims. Co-Lead Counsel also worked with their consulting damages expert to assist in developing a fair and reasonable Plan of Allocation. Ex. 4-A at 5-7.

79. Another large component of the litigation expenses was for online legal and factual research. In addition to researching the law pertaining to such complex areas such as, *inter alia*, falsity, materiality, scienter, and causation, Co-Lead Counsel necessarily spent considerable time and expense performing factual research.

80. The other expenses for which plaintiffs' counsel seek payment are the types of expenses that are necessarily incurred in litigation and routinely charged to clients billed by the hour. These expenses include court fees, costs of out-of-town travel, copying costs, long distance telephone and facsimile charges, and postage and delivery expenses.

81. All of the litigation expenses incurred, which total $65,628.07, were necessary to the successful prosecution and resolution of the claims against Defendants.

XI. MISCELLANEOUS EXHIBITS

82. Attached hereto as Exhibit 11 is a compendium of unreported cases, in alphabetical order, cited in the accompanying Memorandum of Law in Support of Co-Lead Counsel's Motion for an Award of Attorneys' Fees and Expenses.

XII. CONCLUSION

83. In view of the significant recovery to the Settlement Class and the substantial risks of this litigation, as described above and in the accompanying memorandum of law, Lead Plaintiffs and Co-Lead Counsel respectfully submit that the Settlement should be approved as fair, reasonable, and adequate and that the proposed Plan of Allocation should likewise be approved as fair, reasonable, and adequate. In view of the significant recovery in the face of substantial risks, the quality of work performed, the contingent nature of the fee, and the standing and experience of Co-Lead Counsel, as described above and in the accompanying memoranda of law, Co-Lead Counsel respectfully submit that a fee in the amount of 33% of the Settlement Fund be awarded, and that the requested litigation expenses in the amount of $65,628.07, plus accrued interest be paid.

We declare, under penalty of perjury, that the foregoing facts are true and correct. Executed this 4th day of June, 2014.

JONATHAN GARDNER

EVAN J. KAUFMAN