UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

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

MEMORANDUM OF LAW IN SUPPORT OF LEAD PLAINTIFFS' MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND PLAN OF ALLOCATION OF SETTLEMENT PROCEEDS

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## I. INTRODUCTION

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, 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"), respectfully submit this memorandum of law in support of their motion for final approval of the settlement of this Action on the terms set forth in the Stipulation and Agreement of Settlement dated February 6, 2014 ("Stipulation" or "Settlement"),[1] which was previously submitted to the Court. Dkt. No. 56. The Settlement provides for the payment on behalf of Defendants[2] of $6 million in cash, plus interest, and, if approved by the Court, will resolve this matter in its entirety between the parties. The Settlement is the result of extensive arm's-length negotiations between the parties with the assistance of retired Delaware Court of Chancery Vice Chancellor Stephen P. Lamb, a highly respected and experienced mediator. As discussed herein and in the 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 ("Joint Decl." or "Joint Declaration"), Lead Plaintiffs and their counsel have obtained an excellent result for the Settlement Class.[3]

This case was carefully investigated and vigorously litigated. Defendants asserted strong defenses, adamantly denied liability, and were firm in their belief that Lead Plaintiffs could not

[1] All capitalized terms not otherwise defined herein shall have the same meanings as set forth in the Stipulation.

[2] "Defendants" means Chemed Corporation ("Chemed" or the "Company"), Kevin McNamara, David Williams and Timothy O'Toole.

[3] The Court is respectfully referred to the accompanying Joint Declaration for a more detailed history of the Action, the extensive efforts of Co-Lead Counsel, and the factors bearing on the reasonableness of the Settlement, Plan of Allocation of Settlement proceeds, and counsel's request for an award of attorneys' fees and expenses.

prevail. While the case settled at a relatively early stage, a result consistent with the purposes of the Federal Rules of Civil Procedure,[4] Co-Lead Counsel spent a considerable amount of time and resources on this case. The Settlement was achieved only after Co-Lead Counsel: (i) conducted a thorough pre-filing investigation of Lead Plaintiffs' claims, including a meticulous review of Chemed's public filings, analyst reports, and media items, particularly those concerning its VITAS business segment; (ii) filed a detailed Amended Complaint after further investigation ("First Amended Complaint"); (iii) briefed an opposition to Defendants' motion to dismiss the First Amended Complaint; (iv) reviewed information concerning the investigation of the Company conducted by the U.S. Department of Justice ("DOJ") into allegations of Medicare fraud; (v) reviewed pleadings in numerous *qui tam* actions against the Company concerning similar allegations; (vi) identified and interviewed numerous potential witnesses, many of whose accounts were included in the complaints filed by Lead Plaintiffs; (vii) moved for leave to file a second amended complaint, and prepared that document; (viii) met extensively with experts on the hospice care industry, Medicare reimbursement practices, and damages and causation issues; and (ix) prepared for and attended mediation with Vice Chancellor Lamb. Joint Decl., ¶¶8, 65. During the settlement negotiations, Co-Lead Counsel made it clear that, while they were prepared to fairly assess the strengths and weaknesses of their case, they would continue to litigate rather than settle for less than an amount that was in the Settlement Class' best interest.

The Settlement takes into account the specific risks and obstacles that Lead Plaintiffs and the Settlement Class would face if litigation were to continue. Co-Lead Counsel are highly experienced in prosecuting securities class actions, and have concluded that the Settlement is an excellent recovery in the light of the risks, delay and expense of continued litigation. This conclusion is based

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[4] *See In re Xcel Energy, Inc.*, 364 F. Supp. 2d 980, 992 (D. Minn. 2005) (noting that early resolution of the case is consistent with Rule 1 of the Federal Rules of Civil Procedure).

on, among other things, the substantial and certain recovery obtained when weighed against the significant risk, expense, and delay presented in continuing the Action through the completion of briefing on the motion to dismiss, discovery, class certification, motion(s) for summary judgment, trial, and probable post-trial motions and appeal(s); a complete analysis of the facts adduced to date; past experience in litigating complex actions similar to the present action; and the serious disputes between the parties concerning the merits and damages. *Id.*, ¶¶31-45.

As discussed herein and in the Joint Declaration, it is respectfully submitted that the Settlement is fair, reasonable, and adequate and should be approved by the Court. Lead Plaintiffs also request that the Court approve the Plan of Allocation of Settlement proceeds. This plan, which was set forth in the Notice that was sent to Settlement Class Members, governs how claims will be calculated and ultimately, how money will be distributed to Authorized Claimants. The plan, which was developed with the assistance of Lead Plaintiffs' damages expert, tracks Lead Plaintiffs' theory of damages, and is fair, reasonable, and adequate, and should likewise be approved.

## II. THE NOTICE OF SETTLEMENT SATISFIES RULE 23 AND DUE PROCESS REQUIREMENTS

Pursuant to Federal Rule of Civil Procedure 23(e)(1), a district court, when approving a class action settlement, "'must direct notice in a reasonable manner to all class members who would be bound by the proposal.'" *Fidel v. Farley*, 534 F.3d 508, 513 (6th Cir. 2008) (citation omitted). In addition to the requirements of Rule 23, the Constitution's Due Process Clause also guarantees unnamed class members the right to notice of certification or settlement. *See id.* at 513. Generally, "[f]or any class certified under Rule 23(b)(3), the court must direct to class members 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). A notice of settlement satisfies due process when it is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

*Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Here, the Notice, in plain, easily-understood language, advises potential Settlement Class Members of the essential terms of the Settlement, sets forth the procedure and deadline for submitting objections and requests for exclusion to the Settlement, provides whom to contact for additional information, and provides specifics regarding the date, time, and place of the Settlement Hearing. The Notice also contains information regarding Co-Lead Counsel's Fee and Expense Application, and the Plan of Allocation. Thus, the Notice provides the necessary information for Settlement Class Members to make an informed decision regarding the Settlement and their rights with respect to it.

Furthermore, in securities class actions, the Private Securities Litigation Reform Act of 1995 ("PSLRA") requires the notice of settlement to include: (1) "[t]he amount of the settlement proposed to be distributed to the parties to the action, determined in the aggregate and on an average per share basis"; (2) "[i]f the parties do not agree on the average amount of damages per share that would be recoverable if the plaintiff prevailed on each claim alleged under this title, a statement from each settling party concerning the issue or issues on which the parties disagree"; (3) "a statement indicating which parties or counsel intend to make . . . an application [for attorneys' fees or costs], the amount of fees and costs that will be sought (including the amount of such fees and costs determined on an average per share basis), and a brief explanation supporting the fees and costs sought"; (4) "[t]he name, telephone number, and address of one or more representatives of counsel for the plaintiff class who will be reasonably available to answer questions from class members"; and (5) "[a] brief statement explaining the reasons why the parties are proposing the settlement." 15 U.S.C. §78u-4(a)(7). The Notice includes all of the information required by the PSLRA.

In the Order preliminarily approving settlement ("Preliminary Approval Order") (Dkt. No. 57), the Court approved Lead Plaintiffs' proposed notice plan. Preliminary Approval Order, ¶¶9-

12.[5] Lead Plaintiffs have satisfied all of the elements of the notice plan approved by the Court. *See generally* 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 ("Sylvester Decl."), submitted herewith. The notice program implemented in this Action constitutes the best notice practicable under the circumstances and satisfies the requirements of due process, Federal Rule of Civil Procedure 23, and the PSLRA. *See, e.g.*, *Manners v. Am. Gen. Life Ins. Co.*, No. 3-98-0266, 1999 U.S. Dist. LEXIS 22880, at *31 (M.D. Tenn. Aug. 11, 1999) (finding individual notice mailed to class members combined with summary publication constituted "'the best practicable notice'" and were "'reasonably calculated, under the circumstances'" to meet the requirements of Rule 23 and due process) (citation omitted).

## III. THE SETTLEMENT SHOULD BE APPROVED BY THE COURT

### A. The Standards for Judicial Approval of Class Action Settlements

It is well settled that compromises of disputed claims are favored by the courts. *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910); *UAW v. GMC*, 497 F.3d 615, 632 (6th Cir. 2007). "Being a preferred means of dispute resolution, there is a strong presumption by courts in favor of settlement." *In re Telectronics Pacing Sys.*, 137 F. Supp. 2d 985, 1027 (S.D. Ohio 2001); *see also In re Packaged Ice Antitrust Litig.*, No. 08-MD-01952, 2010 U.S. Dist. LEXIS 77645, at *33-*34 (E.D. Mich. Aug. 2, 2010); *Enter. Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 246 (S.D. Ohio 1991) ("The law generally favors and encourages the settlement of class actions."). This is particularly true in class actions and other complex cases where substantial resources can be conserved by avoiding the time, cost, and rigors of prolonged litigation. *See Rankin v. Rots*, No. 02-

[5] Moreover, pursuant to Rule 23(b)(3), the Court certified the Settlement Class for settlement purposes only. Nothing has changed to alter the appropriateness of the Court's ruling and the Settlement Class should be finally certified for purposes of the Settlement.

CV-71045, 2006 U.S. Dist. LEXIS 45706, at *8-*9 (E.D. Mich. June 28, 2006) ("[T]he Court should consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation.").

Pursuant to Rule 23(e), a court should approve a class action settlement if it is fair, adequate, and reasonable. *UAW*, 497 F.3d at 631; *Williams v. Vukovich*, 720 F.2d 909, 921 (6th Cir. 1983); *Telectronics*, 137 F. Supp. 2d at 1008; *Brotherton v. Cleveland*, 141 F. Supp. 2d 894, 903 (S.D. Ohio 2001). In determining whether a proposed settlement is fair, adequate, and reasonable, the Sixth Circuit and the district courts therein have established factors for a court to consider, including: (1) the plaintiffs' likelihood of ultimate success on the merits balanced against the amount and form of relief offered in the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the risk of fraud or collusion; (4) the stage of the proceedings and the amount of discovery completed; (5) the judgment of experienced trial counsel; (6) the nature of the negotiations; (7) the objections raised by the class members; and (8) the public interest. *Poplar Creek Dev. Co. v. Chesapeake Appalachia, L.L.C.*, 636 F.3d 235, 244 (6th Cir. 2011); *UAW*, 497 F.3d at 631; *Gascho v. Global Fitness Holdings, LLC*, No. 2:11-cv-436, 2014 U.S. Dist. LEXIS 46846, at *47 (S.D. Ohio Apr. 4, 2014). Courts have consistently utilized these factors in considering the fairness, reasonableness, and adequacy of proposed class action settlements. *See, e.g.*, *Williams*, 720 F.2d at 922; *Granada Invs., Inc. v. DWG Corp.*, 823 F. Supp. 448, 453 (N.D. Ohio 1993) (citing *Bronson v. Bd. of Educ.*, 604 F. Supp. 68, 73 (S.D. Ohio 1984)).

These factors should not be applied in a "formalistic" fashion. *Whitford v. First Nationwide Bank*, 147 F.R.D. 135, 140 (W.D. Ky. 1992) ("A class action settlement cannot be measured precisely against any particular set of factors."). "In considering these factors, the task of the court 'is not to decide whether one side is right or even whether one side has the better of these arguments . . . . The question rather is whether the parties are using settlement to resolve a legitimate legal and

factual dispute.'" *Gascho*, 2014 U.S. Dist. LEXIS 46846, at *47 (quoting *UAW*, 497 F.3d at 632). Courts have consistently held that the function of a judge in reviewing a settlement is not to rewrite the settlement agreement reached by the parties or to try the case by resolving issues intentionally left unresolved. *See, e.g.*, *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981) ("Courts judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement. They do not decide the merits of the case or resolve unsettled legal questions.") (citation omitted).

The view of experienced counsel favoring the settlement is entitled to great weight. *Kogan v. AIMCO Fox Chase, L.P.*, 193 F.R.D. 496, 501 (E.D. Mich. 2000) (citing *Bronson*, 604 F. Supp. at 73). A court should "defer to the judgment of experienced counsel who has competently evaluated the strength of his proofs." *Williams*, 720 F.2d at 922-23; *see also Kogan*, 193 F.R.D. at 501. Where, as here, a settlement is endorsed as fair by experienced and sophisticated counsel after rigorous arm's-length negotiations, there is a strong initial presumption that the compromise is fair and reasonable. Importantly, the Lead Plaintiffs also approve the Settlement. Joint Decl., ¶10. *See also* Declaration of Michael P. Donovan, ¶5 and Declaration of James Klein, ¶4, submitted herewith.

When examined under the applicable criteria, this Settlement is a highly favored result for the Settlement Class. Co-Lead Counsel believe that there are serious questions as to whether a more favorable monetary result against Defendants could or would be attained after summary judgment, trial, and the inevitable post-trial motions and appeals. The Settlement achieves a substantial and certain recovery for Settlement Class Members and is unquestionably superior to the distinct possibility that were the Action to proceed to trial, there could be no recovery at all. Analysis of the relevant factors demonstrates that the Settlement merits this Court's final approval.

### B. The Settlement Satisfies the Criteria for Final Approval

#### 1. The Likelihood of Success on the Merits Balanced Against Relief Offered

The most important factor courts consider in approving a class action settlement is the plaintiff's likelihood of success on the merits, balanced against the amount and form of relief offered in settlement. *Poplar Creek*, 636 F.3d at 245, *Williams*, 720 F.2d at 922. As in every complex case of this kind, Lead Plaintiffs faced formidable obstacles to recovery if litigation were to continue. The principal claims in this Action are based upon §10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. While Co-Lead Counsel believe that they could prove the claims asserted, there is a great deal of risk present and there was certainly no guarantee that they would prevail at trial and ultimately collect on a larger judgment after trial and subsequent appeals. Post-PSLRA rulings make it clear that the risk of no recovery has increased exponentially since the PSLRA was adopted in 1995.[6] In fact, in cases filed after 2000, 47% of motions to dismiss have been granted in their entirety, and an additional 17% were granted in part. *See* Dr. Renzo Comolli, Sukaina Klein, Dr. Ronald I. Miller & Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2012 Full-Year Review, Settlements Up; Attorneys' Fees Down* (NERA Jan. 29, 2013) at 16. In the Sixth Circuit, motions to dismiss were granted in their entirety in 46% of cases. *Id.* at 18 (Fig. 16).

Securities litigation generally involves complex issues of fact and law, and this case is no exception. For example, to establish liability under §10(b), Lead Plaintiffs bear the burden of proving, *inter alia*, that Defendants participated in the public dissemination of false or misleading

[6] *See In re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) ("securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA"). Retired Supreme Court Justice Sandra Day O'Connor recognized: "To be successful, a securities class-action plaintiff must thread the eye of a needle made smaller and smaller over the years by judicial decree and congressional action." *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 235 (5th Cir. 2009).

information, that the information was material to investors in determining whether to invest in Chemed stock, that the information impacted the market price of the stock, caused damage to the Settlement Class, and that Defendants acted with scienter. *In re Comshare Inc. Sec. Litig.*, 183 F.3d 542, 548 (6th Cir. 1999). Further litigation to establish both liability and damages posed a significant threat to any recovery for the Settlement Class.

Lead Plaintiffs' case centered on allegations that during the Class Period, Defendants inappropriately admitted patients to Chemed's hospice program, and that Medicare was billed for these allegedly inappropriate practices. Joint Decl., ¶¶11-12. Lead Plaintiffs further 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 to $68.00 at the close of trading on May 3, 2013, causing losses to the Settlement Class. *Id.*, ¶13.

Lead Plaintiffs and Co-Lead Counsel considered the significant risks associated with proving the claims alleged prior to determining that settlement would be in the best interest of the Settlement Class. Specifically, Defendants argued that Lead Plaintiffs could not prove that a single patient was inappropriately admitted to hospice care or that Medicare was billed for an inappropriately admitted patient. Joint Decl., ¶33. Hospice decisions are made by doctors with input from nursing staff, and these decisions are inherently subjective. It would, therefore, be difficult, if not impossible to prove that the decision to admit certain patients to hospice care was not legitimately based. *Id.* Moreover, during the Class Period, Chemed operated over 100 hospice centers in 16 states. *Id.* Lead Plaintiffs would have to prove that the scheme was orchestrated by Defendants and actively perpetrated throughout VITAS. *Id.* Medical experts would have had to be retained to review patient charts to ensure hospice admissions were properly done. Not only would this take a great deal of time and be

extraordinarily expensive, but it is very possible that a jury could conclude that any decision on patient eligibility for hospice care was reasonably made, and not part of a scheme to defraud. *Id.*

Defendants would also be expected to continue to argue that Lead Plaintiffs could not prove falsity or materiality. Joint Decl., ¶34. Defendants have argued that Chemed's financial results and admission data were accurate, and that the Company never restated its financial statements. *Id.* Therefore, even if Lead Plaintiffs could establish that Defendants engaged in a scheme to inappropriately admit hospice patients, Lead Plaintiffs would also have to prove that this scheme materially inflated Chemed's financial results and admissions data. *Id.* Defendants have also maintained that their statements of belief as to Chemed's compliance with Medicare rules are not actionable. *Id.*, ¶35. The law on this issue is currently unresolved, but on March 3, 2014, the Supreme 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*, ___ U.S. ___, 134 S. Ct. 1490 (2014), to determine this issue. *Id.* A decision by the Supreme Court that subjective falsity needs to be proven for a statement of opinion would require that Lead Plaintiffs prove that Defendants actually knew that their opinions were false at the time they were made.

Even if Lead Plaintiffs proved a scheme to inappropriately admit patients across VITAS' 100-plus locations, and the materiality and falsity of the alleged misstatements, they still would have had to prove that each of the Defendants acted with scienter. Joint Decl., ¶36. This requires proof that each Defendant acted with knowledge of or with recklessness as to the alleged falsity of their statements and omissions. A defendant's state of mind in a securities case is often the most difficult element of proof and one which is rarely supported by direct evidence such as an admission. Thus, Lead Plaintiffs may not have been able to adduce sufficient evidence to satisfy their burden of proof on this issue. Defendants McNamara and Williams were officers of Chemed, and not VITAS, during the Class Period. *Id.*, ¶37. They would continue to argue that they could not be charged with

direct knowledge of what was happening at each of VITAS' 100-plus locations. *Id.* While defendant O'Toole was CEO of the VITAS unit, he would have argued that discovery could not show that he knew about the alleged fraud. *Id.*[7]

Although Lead Plaintiffs believe that they would present sufficient evidence to support their claims, they were aware that Defendants would present counter-evidence and other substantial obstacles to obtaining a judgment in their favor after trial. There was no certainty that discovery would support Lead Plaintiffs' allegations. *See In re Delphi Corp. Sec.*, 248 F.R.D. 483, 496 (E.D. Mich. 2008) (discussing "the risk that Defendants could prevail with respect to certain legal or factual issues, which could result in the reduction or elimination of Plaintiffs' potential recoveries").

Even if Lead Plaintiffs established liability, they faced substantial risks in proving loss causation and damages. Defendants would present expert testimony purportedly demonstrating the absence of a causal link between the various stock price declines and the alleged false and misleading statements. Defendants had contended in the past, and would undoubtedly argue at summary judgment and/or trial, 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 decline at the time the *Rehfeldt* complaint itself became public. Joint Decl., ¶40. 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 the Class Period. *Id.*

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[7] To further their scienter allegations, Lead Plaintiffs claimed that Defendants received benefits from the Company's Long Term Incentive Plan when the stock price hit certain benchmarks, and that Defendants sold millions of dollars in stock during the Class Period, while the stock was artificially inflated by the alleged fraud. *Id.*, ¶38. Defendants argued, however, that the stock sales were not inconsistent with previous sales, and that any incentives they received from the incentive plan would not be sufficient to establish scienter, as those incentives exist at most corporations. *Id.*

With respect to the announcement of an investigation of the Company by the DOJ, Defendants have contended that government investigations, like allegations in a private suit, do not indicate anything more than a "risk" that Defendants engaged in inappropriate conduct, and therefore, such allegations are insufficient to support loss causation. The Supreme Court's decision in *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 346 (2005), and subsequent cases interpreting *Dura*, have made proving loss causation even more difficult and uncertain than in the past. *See, e.g.*, *In re Tyco Int'l, Ltd.*, 535 F. Supp. 2d 249, 260 (D.N.H. 2007) ("Proving loss causation would be complex and difficult."); *Meyer v. Green*, 710 F.3d 1189 (11th Cir. 2013) (affirming order granting motion to dismiss, finding, among other things, that announcement of SEC investigation, without more, failed to adequately support loss causation); *Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713 (11th Cir. 2012) (affirming lower court ruling that granted defendants' motion for judgment as a matter of law based on plaintiff's failure to prove loss causation, thereby overturning a jury verdict in plaintiff's favor).

The amount of damages incurred by Settlement Class Members would also have been hotly contested at trial. Damages in securities class action cases are always difficult to prove. At trial, the damage assessments of Lead Plaintiffs' and Defendants' experts were sure to vary substantially, and in the end, this crucial element at trial would have been reduced to a "battle of the experts." *Tyco*, 535 F. Supp. 2d at 260-61 ("even if the jury agreed to impose liability, the trial would likely involve a confusing 'battle of the experts' over damages"). The reaction of a jury to competing expert testimony is highly unpredictable and in such a battle, a jury could be swayed by convincing experts for the Defendants, and find that there were no damages or only a fraction of the amount of damages Lead Plaintiffs contended.[8] Here, Lead Plaintiffs recovered a substantial recovery relative to the

[8] *See, e.g.*, *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744-45 (S.D.N.Y. 1985) (approving settlement where "it is virtually impossible to predict with any certainty which testimony would be credited, and ultimately, which damages would be found to have been caused by

maximum provable damages, without the risk of continued and expensive litigation. Lead Plaintiffs' expert has estimated, based on certain assumptions and modeling, that the Settlement Class sustained aggregate maximum damages in the range of between $42 and $52 million. Joint Decl., ¶5. This Settlement thus represents approximately 11.5% to 14% of the estimated maximum losses, which is at the higher end of recoveries commonly achieved in securities settlements. *See, e.g.*, *In re Fannie Mae Sec., Derivative, and ERISA Litig.*, No. 04-1639 (RJL), 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 recover and noting that such percentage "compares favorably with other cases approving securities class action settlements") (citation omitted); *In re Omnivision Techs.*, 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").

Even if Lead Plaintiffs prevailed and obtained a substantial judgment after trial, there is little doubt that Defendants would have filed post-trial motions and if unsuccessful would appeal the verdict and award. The post-trial motions and appeals process would have likely spanned several years, during which the Settlement Class would have received no distribution on any damage award. In addition, an appeal of any verdict would carry the risk of reversal, in which case the Settlement Class would receive no recovery after having prevailed on the claims at trial. Finally, even with a judgment in hand, there is no guarantee that it would be collectable after years of delay. Therefore, the amount of damages the Settlement Class would actually recover is uncertain.

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actionable, rather than the myriad nonactionable factors such as general market conditions"), *aff'd*, 798 F.2d 35 (2d Cir. 1986); *In re Veeco Instruments Sec. Litig.*, No. 05 MDL 01695 (CM), 2007 U.S. Dist. LEXIS 85629, at *30 (S.D.N.Y. Nov. 7, 2007) ("The jury's verdict with respect to damages would depend on its reaction to the complex testimony of experts, a reaction which at best is uncertain.").

### 2. The Complexity, Expense, and Likely Duration of the Litigation

The complexity, expense, and likely duration of the litigation is another factor considered in determining the fairness of a settlement. *Telectronics*, 137 F. Supp. 2d at 1013. *See also Delphi*, 248 F.R.D. at 497 ("Courts have consistently held that the expense and possible duration of litigation are major factors to be considered in evaluating the reasonableness of a settlement."). There is no doubt that this securities class action involves complex factual issues relating to Medicare reimbursement and the hospice care industry and legal issues relating to falsity, scienter and loss causation. While courts have long recognized that "stockholder litigation is notably difficult and notoriously uncertain," *Lewis v. Newman*, 59 F.R.D 525, 528 (S.D.N.Y. 1973), since the enactment of the PSLRA, "securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA." *Ikon*, 194 F.R.D. at 194; *see also New Eng. Health Care Emps. Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 631 (W.D. Ky. 2006) ("'Securities class actions are often "difficult and . . . uncertain."'") (citations omitted).

If not for this Settlement, the case would have continued to be fiercely contested by all parties. Defendants have demonstrated a commitment to defend the case through and beyond trial, if necessary, and they are represented by well-respected and highly-capable counsel. The expense of continued litigation would be substantial as Lead Plaintiffs would have had to prevail on Defendants' motion to dismiss and successfully moved to certify a class. The parties would then have had to complete a lengthy, extensive, and time-consuming discovery program, involving a review and analysis of documents from Defendants and non-parties and an extensive deposition program. Experts would have to be designated and expert discovery conducted. Inevitably, Defendants would have filed motion(s) for summary judgment and a motion to decertify the class (should a class have been certified).

Assuming Lead Plaintiffs' claims survived summary judgment, a pre-trial order would have to be prepared, proposed jury instructions would have to be submitted, and motions *in limine* would have to be filed and argued. Moreover, any trial involving some or all of the Defendants would likely run several weeks, and involve numerous attorneys, witnesses, experts, and the introduction of voluminous documentary and deposition evidence, vigorously contested trial motions, and the expenditure of enormous amounts of judicial and counsel resources. Even if successful at trial, appeals would be virtually assured.[9] Taking into account the likelihood of appeal, absent the Settlement, the Action likely would have continued for years, and would have caused Settlement Class Members who suffered economic losses to wait years longer for a resolution of their claims. *See In re Chambers Dev. Sec. Litig.*, 912 F. Supp. 822, 837 (W.D. Pa. 1995) ("It is safe to say, in a case of this complexity, the end of that road might be miles and years away."). "To most people, a dollar today is worth a great deal more than a dollar ten years from now." *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 284 (7th Cir. 2002).

### 3. The Stage of Proceedings and Extent of Discovery

To ensure that a plaintiff had access to sufficient information to evaluate its case and to assess the adequacy of the settlement proposal, the stage of the proceedings and the extent of discovery is another factor which is considered in determining the fairness of the settlement. *Telectronics*, 137 F. Supp. 2d at 1015; *Kogan*, 193 F.R.D. at 502. In this Action, both the knowledge of Co-Lead Counsel and the proceedings themselves reached a stage where an intelligent evaluation of the strengths and weaknesses of the Settlement Class' claims and the propriety of the Settlement could be made. *In re Packaged Ice Antitrust Litig.*, No. 08-MDL-01952, 2011 U.S. Dist.

[9] *See In re Broadwing, Inc. ERISA Litig.*, 252 F.R.D. 369, 373-74 (S.D. Ohio 2006) (explaining "the difficulty Plaintiffs would encounter in proving their claims, the substantial litigation expenses, and a possible delay in recovery due to the appellate process, provide justifications for this Court's approval of the proposed Settlement").

LEXIS 150427, at *58, *60 (E.D. Mich. Dec. 13, 2011) (concluding "the absence of extensive discovery does not weigh against final approval" of the settlement where the parties had proceeded with document discovery but the case was still in "a relatively early stage . . . before class certification and before the initiation of discovery in earnest").

As set forth above and in the Joint Declaration, this case has been vigorously litigated from start to finish. Prior to settlement, Co-Lead Counsel, among other things, conducted an extensive and thorough investigation of the facts alleged; reviewed and analyzed an enormous quantity of publicly-available information about Defendants and the allegations; drafted and filed detailed complaints; briefed Defendants' motion to dismiss and a motion for leave to amend the complaint; identified and interviewed scores of potential witnesses; and consulted with experienced experts. The parties also participated in hard-fought settlement negotiations, including mediation with Vice Chancellor Lamb, where the strengths and weaknesses of the parties' respective claims and defenses were fully explored. Moreover, prior to the mediation, the parties prepared and exchanged detailed mediation statements which further highlighted the legal and factual issues in dispute.

There is no question that Lead Plaintiffs and their counsel were in an excellent position to evaluate the strengths and weaknesses of the claims asserted and defenses raised, as well as the risks of continued litigation and the propriety of settlement. Having sufficient information to properly evaluate the case, Lead Plaintiffs have settled the Action on terms highly favorable to the Settlement Class without the substantial expense, risk, and uncertainty of continued litigation.

#### 4. The Settlement Is the Result of "Arm's-Length" Negotiations Among Competent and Experienced Counsel

In appraising the fairness of a proposed settlement, a court is entitled to rely heavily on the opinion of competent counsel. *Williams*, 720 F.2d at 922-23; *Telectronics*, 137 F. Supp. 2d at 1015-16. In fact, "[i]n deciding whether a proposed settlement warrants approval, the informed and reasoned judgment of plaintiffs' counsel and their weighing of the relative risks and benefits of

protracted litigation are entitled to great deference." *Thacker v. Chesapeake Appalachia, L.L.C.*, 695 F. Supp. 2d 521, 532 (E.D. Ky. 2010), *aff'd sub nom. Poplar Creek*, 636 F.3d 235. This is especially true where the stage of the proceedings indicates that counsel and the court are fully capable of evaluating the merits of plaintiffs' case and the probable course of future litigation. *See Armstrong v. Gallia Metro. Hous. Auth.*, No. 2:98-CV-373, 2001 WL 1842452, at *4 (S.D. Ohio Apr. 23, 2001). The knowledge of Co-Lead Counsel and the proceedings themselves reached a stage where Co-Lead Counsel could make such an evaluation.

In evaluating the Settlement and the opinion of counsel, the Court may examine the negotiating process to confirm that there was no collusion in reaching the Settlement. The Settlement is the product of hard fought arm's-length negotiations between the parties with the substantial assistance of Vice Chancellor Lamb. *See D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (a "mediator's involvement in . . . settlement negotiations helps to ensure that the proceedings were free of collusion and undue pressure"). As a result of the negotiation process, Co-Lead Counsel, having carefully considered and evaluated, *inter alia*, the relevant legal authorities and evidence to support the claims asserted against Defendants, the likelihood of prevailing on these claims, and the risk, expense, and duration of continued litigation, have made a considered judgment that the Settlement for $6 million is not only fair and reasonable, but under the circumstances is an excellent result for the Settlement Class.

**5. The Reaction of the Settlement Class**

To further support approval of a settlement, courts have also looked to the reaction of the class to the settlement. *Brotherton*, 141 F. Supp. 2d at 906. Of course, "[t]he fact that some class members object to the Settlement does not by itself prevent the court from approving the agreement." *Id.* "'A certain number of . . . objections are to be expected in a class action.'" *Thacker*, 695 F. Supp. 2d at 533 (citation omitted). Moreover, "a relatively small number of class

members who object is an indication of a settlement's fairness." *Brotherton*, 141 F. Supp. 2d at 906 (citing 2 Herbert Newberg & Alba Conte, *Newberg on Class Actions* §11.48 (3d ed. 1992)).

In this case, copies of the Notice were mailed to over 31,140 potential members of the Settlement Class and their nominees. Sylvester Decl., ¶¶3-10. The Summary Notice was also published in *Investor's Business Daily* and over the *Business Wire*. *Id.*, ¶14. In addition, the Notice, Proof of Claim and Release form, the Stipulation, and the Preliminary Approval Order were posted on the Claims Administrator's website. *Id.*, ¶12. While the deadline for filing objections – June 18, 2014 – has not yet expired, to date, no Settlement Class Member has objected to any aspect of the Settlement or the Plan of Allocation of Settlement proceeds and Lead Plaintiffs have received only one request for exclusion, representing only 27 shares. *Id.*, ¶13.

**6. The Public Interest**

"'[T]here is a strong public interest in encouraging settlement of complex litigation and class action suits because they are "notoriously difficult and unpredictable" and settlement conserves judicial resources.'" *Hyland v. Homeservices of Am., Inc.*, No. 3:05-CV-612-R, 2012 U.S. Dist. LEXIS 61994, at *23 (W.D. Ky. May 3, 2012) (citations omitted). As discussed above, the Settlement provides a substantial recovery to a large class of people who purchased Chemed's capital stock in the form of a settlement fund of $6 million, plus interest, and demonstrates the viability of the private enforcement of the federal securities laws. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) (recognizing "that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions"). The Settlement puts an end to contentious and protracted litigation, which absent settlement would have likely continued for many more years in this Court or in the Court of Appeals. *See Broadwing*, 252 F.R.D. at 376 ("[T]here is certainly a public interest in settlement of disputed cases that require substantial federal judicial resources to supervise and resolve.").

Accordingly, Co-Lead Counsel submit that this Court should find that all of the relevant factors, taken together, weigh in favor of settlement and that the Settlement should be approved.

## IV. THE PLAN OF ALLOCATION OF SETTLEMENT PROCEEDS IS FAIR AND REASONABLE AND SHOULD BE APPROVED

The Notice contains the Plan of Allocation of Settlement proceeds, detailing how the Settlement proceeds are to be divided among claiming Settlement Class Members. A trial court has broad discretion in approving a plan of allocation. *See Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 328 (3d Cir. 2011), *cert. denied*, ___ U.S. ___, 132 S. Ct. 1876 (2012); *In re Chicken Antitrust Litig.*, 810 F.2d 1017, 1019 (11th Cir. 1987). The test is simply whether the proposed plan, like the settlement itself, is fair, reasonable, and adequate. *See, e.g.*, *Packaged Ice*, 2011 U.S. Dist. LEXIS 150427, at *65. "“‘Courts generally consider plans of allocation that reimburse class members based on the type and extent of their injuries to be reasonable.’”" *Id.* (citations omitted).

In determining whether a proposed plan is fair, courts look primarily to the opinion of counsel. *White v. NFL*, 822 F. Supp. 1389, 1420 (D. Minn. 1993) (stating that "[t]he court . . . affords considerable weight to the opinion of experienced and competent counsel that is based on their informed understanding of the legal and factual issues involved" in approving distribution of settlement proceeds). Here, Co-Lead Counsel and their damage expert developed the Plan of Allocation of Settlement proceeds that reflects Lead Plaintiffs' damage theory of the case.

The Plan of Allocation provides for distribution of the Settlement proceeds 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.

## V. CONCLUSION

For the foregoing reasons, Lead Plaintiffs and their counsel respectfully request that the Court approve the Settlement and the Plan of Allocation of Settlement proceeds as fair, reasonable, and adequate and in the best interests of the Settlement Class; and finally certify the Settlement Class. Proposed orders will be submitted with Lead Plaintiffs' reply papers, after the deadlines for objecting and seeking exclusion have passed.

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Respectfully submitted,

GOLDENBERG SCHNEIDER, LPA
JEFFREY S. GOLDENBERG (0063771)
TODD B. NAYLOR (0068388)
One West Fourth Street, 18th Floor
Cincinnati, OH 45202-3604
Telephone: 513/345-8297
513/345-8294 (fax)
E-mail: jgoldenberg@gs-legal.com
E-mail: tnaylor@gs-legal.com

Liaison Counsel

ROBBINS GELLER RUDMAN
& DOWD LLP
ELLEN GUSIKOFF STEWART

s/ Ellen Gusikoff Stewart
ELLEN GUSIKOFF STEWART

655 West Broadway, Suite 1900
San Diego, CA 92101-8498
Telephone: 619/231-1058
619/231-7423 (fax)
E-mail: elleng@rgrdlaw.com

ROBBINS GELLER RUDMAN
& DOWD LLP
SAMUEL H. RUDMAN
EVAN J. KAUFMAN
EDWARD Y. KROUB
58 South Service Road, Suite 200
Melville, NY 11747
Telephone: 631/367-7100
631/367-1173 (fax)
E-mail: srudman@rgrdlaw.com
E-mail: ekaufman@rgrdlaw.com
E-mail: ekroub@rgrdlaw.com

LABATON SUCHAROW LLP
JONATHAN GARDNER
CHRISTOPHER J. KELLER

s/ Jonathan Gardner
JONATHAN GARDNER

140 Broadway, 34th Floor
New York, NY 10005
Telephone: 212/907-0700
212/818-0477 (fax)
E-mail: jgardner@labaton.com
E-mail: ckeller@labaton.com

Co-Lead Counsel for Lead Plaintiffs and the Settlement Class