

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA**

_____, Individually and on Behalf of
All Others Similarly Situated,

Plaintiff,

vs.

APYX MEDICAL CORPORATION,
CHARLES D. GOODWIN II, JAY D.
EWERS, and TARA SEMB,

Defendants.

Case No.

**CLASS ACTION COMPLAINT FOR
VIOLATIONS OF THE FEDERAL
SECURITIES LAWS**

JURY TRIAL DEMANDED

Plaintiff _____ (“Plaintiff”), individually and on behalf of all other persons similarly situated, by Plaintiff’s undersigned attorneys, for Plaintiff’s complaint against Defendants (defined below), alleges the following based upon personal knowledge as to Plaintiff and Plaintiff’s own acts, and information and belief as to all other matters, based upon, *inter alia*, the investigation conducted by and through her attorneys, which included, among other things, a review of the Defendants’ public documents, conference calls and announcements made by Defendants, United States Securities and Exchange Commission (“SEC”) filings, wire and press releases published by and regarding Apyx Medical Corporation (“Apyx” or the “Company”), and information readily obtainable on the Internet. Plaintiff believes that substantial evidentiary support will exist for the allegations set forth herein after a reasonable opportunity for discovery.

NATURE OF THE ACTION

1. This is a federal securities class action on behalf of a class consisting of all persons and entities other than Defendants who purchased or otherwise acquired the publicly traded securities of Apyx from November 2, 2018 through March 16, 2020, both dates inclusive

(the “Class Period”). Plaintiff seeks to recover compensable damages caused by Defendants’ violations of the federal securities laws and to pursue remedies under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the “Exchange Act”) and Rule 10b-5 promulgated thereunder.

JURISDICTION AND VENUE

2. The claims asserted herein arise under and pursuant to Sections 10(b) and 20(a) of the Exchange Act (15 U.S.C. §§ 78j(b) and 78t(a)) and Rule 10b-5 promulgated thereunder by the SEC (17 C.F.R. § 240.10b-5).

3. This Court has jurisdiction over the subject matter of this action pursuant to Section 27 of the Exchange Act (15 U.S.C. §78aa).

4. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b) and Section 27 of the Exchange Act (15 U.S.C. § 78aa(c)) as the Company conducts business in this judicial district. The Company’s headquarters are located in this judicial district.

5. In connection with the acts, conduct and other wrongs alleged in this complaint, Defendants, directly or indirectly, used the means and instrumentalities of interstate commerce, including but not limited to, the United States mails, interstate telephone communications and the facilities of the national securities exchange.

PARTIES

6. Plaintiff, as set forth in the accompanying certification, incorporated by reference herein, purchased Apyx securities at artificially inflated prices during the Class Period and was economically damaged thereby.

7. Defendant Apyx is medical technology company that manufactures and sells medical devices in the cosmetic and surgical markets worldwide. Apyx operates through two

segments, Advanced Energy and original equipment manufacturing (“OEM”). The Company is incorporated in Delaware and its principal executive office is located in Clearwater, Florida. Prior to January 1, 2019, Apyx was called Bovie Medical (“Bovie”). While Bovie, the Company’s stock traded on the New York Stock Exchange (“NYSE”) under the ticker “BVX.” Starting January 2, 2019, the Company’s stock began trading on NASDAQ under the ticker symbol “APYX.”

8. Defendant Charles D. Goodwin II (“Goodwin”) has served as the Company’s President, Chief Executive Officer (“CEO”), and Director throughout the Class Period.

9. Defendant Jay D. Ewers (“Ewers”) served as the Company’s Chief Financial Officer (“CFO”), Treasurer, and Secretary from the beginning of the Class Period until his retirement on December 31, 2018.

10. Defendant Tara Semb (“Semb”) has served as the Company’s CFO from January 2, 2019 throughout the end of the Class Period.

11. Defendants Goodwin, Ewers, and Semb are collectively referred to herein as the “Individual Defendants.”

12. Each of the Individual Defendants:

- a. directly participated in the management of the Company;
- b. was directly involved in the day-to-day operations of the Company at the highest levels;
- c. was privy to confidential proprietary information concerning the Company and its business and operations;

- d. was directly or indirectly involved in drafting, producing, reviewing and/or disseminating the false and misleading statements and information alleged herein;
- e. was directly or indirectly involved in the oversight or implementation of the Company's internal controls;
- f. was aware of or recklessly disregarded the fact that the false and misleading statements were being issued concerning the Company; and/or
- g. approved or ratified these statements in violation of the federal securities laws.

13. Apyx is liable for the acts of the Individual Defendants and its employees under the doctrine of *respondeat superior* and common law principles of agency because all of the wrongful acts complained of herein were carried out within the scope of their employment.

14. The scienter of the Individual Defendants and other employees and agents of the Company is similarly imputed to Apyx under *respondeat superior* and agency principles.

15. Defendants Apyx and Individual Defendants are collectively referred to herein as "Defendants."

SUBSTANTIVE ALLEGATIONS

Background

16. On March 13, 2018, Apyx filed a Form 10-K for the fiscal year ended December 31, 2017 (the "2017 10-K"). The 2017 10-K stated the following as to the Company's internal controls:

Our management assessed the effectiveness of our internal control over financial reporting as of December 31, 2017. In making this assessment, management used the criteria set forth by the Committee of Sponsoring Organizations of the Treadway Commission (COSO) in Internal Control — Integrated Framework

(2013). Based on our assessment, our management has concluded that, as of December 31, 2017, our internal control over financial reporting was effective.

**Materially False and Misleading
Statements Issued During the Class Period**

17. On November 1, 2018, after the market closed, Apyx, then known as Bovie, issued the press release “Bovie Medical Corporation Reports Third Quarter 2018 Financial Results and Updates Fiscal Year 2018 Outlook.” The press release discussed the financial results for the third quarter of 2018, stating in part:

Third Quarter 2018 Financial Summary:

- Total Q3 revenue from continuing operations of approximately \$3.7 million, up 39% year-over-year.
- Advanced Energy revenue of \$3.0 million, up 40% year-over-year, driven by strong J-Plasma/Renuvion sales.
- OEM revenue of approximately \$0.7 million, up 31% year-over-year.
- Total Q3 adjusted EBITDA loss from continuing operations of approximately \$2.4 million versus adjusted EBITDA loss from continuing operations of approximately \$2.5 million for the third quarter of 2017.

* * *

Gross profit for the third quarter of 2018 increased approximately \$0.6 million, or 31.8% year-over-year, to \$2.5 million, compared to \$1.9 million for third quarter of 2017. Gross margin for the third quarter of 2018 was 68.7%, compared to 72.2% last year. The primary drivers of the decrease in gross profit margin were Advanced Energy product mix and Advanced Energy sales outside the U.S., which represented a higher mix of total sales in the third quarter of 2018 compared to last year.

Operating expenses from continuing operations for the third quarter of 2018 increased approximately \$0.6 million, or 12.0% year-over-year, to \$5.3 million, compared to \$4.7 million for the third quarter of 2017. The year-over-year change in operating expenses from continuing operations was primarily driven by a \$0.3 million increase in salaries and related costs, a \$0.2 million increase in professional services costs and a \$0.1 million increase in research and development expenses.

Net loss from continuing operations for third quarter 2018 was \$0.4 million, or \$0.01 per diluted share, compared to a net loss from continuing operations of \$2.9 million, or \$0.09 per diluted share, for the third quarter of 2017. Total income from discontinued operations, net of tax, was \$69.6 million in the third quarter of 2018, driven by income from discontinued operations of \$0.5 million and a gain on sale, net of tax, of \$69.1

million related to the disposition of the Core business in the period. Income from discontinued operations, net of tax, was \$1.7 million in the third quarter of 2017. Net income attributable to common shareholders for the third quarter of 2018 was \$69.2 million, or \$1.98 per diluted share, compared to net loss attributable to common shareholders of \$1.2 million, or \$0.04 per diluted share, last year.

(Emphasis added).

18. On November 2, 2018, Apyx filed a Form 10-Q for the quarterly period ended September 30, 2018 with the SEC (the “3Q 2018 10-Q”), which provided the Company’s financial statements and position. The 3Q 2018 10-Q was signed by Defendants Goodwin and Ewers. The 3Q 2018 10-Q contained signed certifications pursuant to the Sarbanes-Oxley Act of 2002 (“SOX”) by Defendants Goodwin and Ewers attesting to the accuracy of financial reporting, the disclosure of any material changes to the Company’s internal controls over financial reporting, and the disclosure of all fraud.

19. The 3Q 2018 10-Q stated the following regarding internal controls;

Changes in Internal Control over Financial Reporting

There were no changes in our internal control over financial reporting (as defined in Rules 13(a)-15(f) and 15(d)-15(f)) during the nine months ended September 30, 2018 that have materially affected, or are reasonably likely to materially affect, our internal control over financial reporting.

20. The 3Q 2018 10-Q discussed stock-based compensation, stating in part:

Under our stock option plans, our board of directors may grant options to purchase common shares to our key employees, officers, directors and consultants. ***We account for stock options in accordance with FASB ASC Topic 718, Compensation - Stock Compensation, with option expense amortized over the vesting period based on the trinomial lattice option-pricing model fair value on the grant date***, which includes a number of estimates that affect the amount of our expense. ***We expensed approximately \$489,000 and \$1,238,000 in stock-based compensation during the three and nine months ended September 30, 2018, respectively***, as compared with \$191,000 and \$532,000 for the three and nine months ended September 30, 2017, respectively.

(Emphasis added)

21. The 3Q 2018 10Q stated that net loss from continuing operations for the three

months ending September 30, 2018 was \$4,311,000.

22. On March 13, 2019, after the market closed, Apyx issued the press release “Apyx Medical Corporation Reports Fourth Quarter and Fiscal Year 2018 Financial Results and Introduces Fiscal Year 2019 Outlook.” The press release reported on the Company’s financial condition, stating in relevant part:

Fiscal Year 2018 Financial Summary:

- 2018 total revenue from continuing operations of approximately \$16.7 million, up 63% year-over-year.
- Advanced Energy revenue of \$13.1 million, up 71% year-over-year.
- OEM revenue of approximately \$3.6 million, up 39% year-over-year.
- 2018 total GAAP loss from continuing operations of \$9.5 million versus total GAAP loss from continuing operations of \$13.7 million in 2017. Excluding the effect of severance and related expenses in both fiscal year periods, 2018 GAAP loss from continuing operations would have been \$8.8 million, versus GAAP loss from continuing operations of \$12.2 million in 2017.
- 2018 total adjusted EBITDA loss from continuing operations of approximately \$11.7 million versus adjusted EBITDA loss from continuing operations of approximately \$12.3 million in 2017. Excluding the effect of severance and related expenses in both fiscal year periods, 2018 adjusted EBITDA loss from continuing operations would have been \$11 million, versus adjusted EBITDA loss from continuing operations of \$10.8 million in 2017.

* * *

Gross profit for the fourth quarter of 2018 increased approximately \$0.8 million, or 30.7% year-over-year, to \$3.5 million, compared to \$2.7 million for fourth quarter of 2017. Gross profit margin for the fourth quarter of 2018 was 59.5%, compared to 73.7% last year. The decrease was driven by lower year over year margins in Advanced Energy from increased international sales offset by increased year over year margins in the OEM segment.

Operating expenses from continuing operations for the fourth quarter of 2018 increased approximately \$2.7 million, or 46.2% year-over-year, to \$8.7 million, compared to \$5.9 million for the fourth quarter of 2017. The year-over-year change in operating expenses from continuing operations was primarily driven by a \$2.0 million increase in salaries and related costs, a \$0.8 million increase in professional services costs, a \$0.2 million increase in research and development expenses, and a \$.5 million increase in selling, general and administrative expenses. Operating expenses from continuing operations for the fourth quarter of 2018 included severance and related expense of \$741,000, related to the departure of the Company’s former Chief Financial Officer.

Net loss from continuing operations for fourth quarter 2018 was \$3.3 million, or \$0.10 per diluted share, compared to a net loss from continuing operations of \$3.0 million, or \$0.09 per diluted share, for the fourth quarter of 2017.

Net loss from continuing operations for the twelve months ended December 31, 2018 was \$9.5 million, or \$0.29 per diluted share, compared to a net loss from continuing operations of \$13.7 million, or \$0.44 per diluted share, for the twelve months ended December 31, 2017. Net income attributable to common shareholders for the twelve months ended December 31, 2018 was \$64.0 million, or \$1.86 per diluted share, compared to net loss attributable to common shareholders of \$5.1 million, or \$0.17 per diluted share, last year.

(Emphasis added).

23. On March 14, 2019, the Company filed its Form 10-K with the SEC for the year ending December 31, 2018 (the “2018 10-K”). The 2018 10-K was signed by Defendants Goodwin and Semb. Attached to the 2018 10-K were SOX certifications signed by Defendants Goodwin and Semb attesting to the accuracy of financial reporting, the disclosure of any material changes to the Company’s internal controls over financial reporting, and the disclosure of all fraud. The 2018 10-K contained the Company’s financial statements and positions for the year ending December 21, 2018.

24. The 2018 10-K stated the following stock-based compensation in relevant part:

Under our stock option plan, options to purchase common shares of the Company may be granted to key employees, officers and directors of the Company by the Board of Directors. *The Company accounts for stock options in accordance with FASB ASC Topic 718-10, Compensation-Stock Compensation, with compensation expense amortized over the vesting period based on the trinomial lattice option-pricing model fair value on the grant date, which includes a number of estimates that affect the amount of our expense.*

(Emphasis added).

25. The 2018 10-K stated the following regarding the revenue of the Company’s OEM segment, in part:

For the year ended December 31, 2018, our OEM segment contributed 21.7% of

our consolidated total revenue and our Advanced Energy segment contributed 78.3% of our consolidated total revenue.

26. The 2018 10-K reported net loss from continuing operations to be \$9,494,000 and gross profit to be \$10,793,000.

27. The 2018 10-K stated that the Company found material weakness in its internal controls over financial reporting as of December 31, 2018. The 2018 10-K stated that the Company was taking steps to remediate the identified material weaknesses, stating in part:

Remediation Efforts to Address Material Weaknesses

Management is committed to maintaining a strong internal control environment. In response to the identified material weaknesses, management, with the oversight of the Audit Committee of the Board of Directors, has taken actions toward the remediation of the respective material weaknesses in internal control over financial reporting as outlined below.

In December 2018 we hired a new Chief Financial Officer and, in February 2018, a new Corporate Controller with experience in internal controls and financial reporting. Both will be actively engaged in remediation efforts to address the material weaknesses throughout fiscal year 2019. We will continue to recruit qualified professionals with appropriate levels of knowledge and experience to assist in resolving accounting issues in non-routine or complex transactions.

We will make further enhancements to our control environment by improving documentation of internal controls, guidance in the performance of those controls, communication of expectations, and emphasis on the importance of internal controls. In addition, we will make improvements to the level of detail in our risk assessment and clarity of the linkage between risks and internal controls.

We will continue to improve upon our risk assessment procedures and the timeliness of those procedures. We will make progress towards addressing the weaknesses in information and communication beginning the process to better identify, document, and assess information used when performing internal controls.

We plan to further enhance our policies, procedures, and controls for all key processes. In addition, management will train personnel to ensure consistent application of accounting principles and adherence to the Company's policies, procedures, and controls. We will implement enhanced monitoring procedures to allow for more effective monitoring of compliance.

We plan to review current financial controls to assess if additional management review controls are necessary and work with all finance personnel to establish the appropriate

documentation criteria for the existing controls including evidence of review, timeliness and variance thresholds.

We will continue to work with the third-party specialists we engaged to review, document, and (as needed) supplement our controls, with the goal of designing and implementing controls that not only better address both the accuracy and precision of management's review, but also enhance our ability to manage our business.

Management believes the steps outlined above, when fully implemented, will remediate the material weaknesses described above. The Audit Committee of the Board of Directors and management will continue to monitor the implementation of these remediation measures and the effectiveness of our internal controls over financial reporting on an ongoing basis.

28. On May 8, 2019, Apyx issued the press release, "Apyx Medical Corporation Reports First Quarter 2019 Financial Results and Updates Fiscal Year 2019 Outlook." The press release discussed the first quarter of 2019 financial results, stating in part:

First Quarter 2019 Financial Summary:

- Total Q1 revenue from continuing operations of \$5.8 million, up 71% year-over-year.
- Advanced Energy revenue of \$4.4 million, up 66% year-over-year.
- OEM revenue of \$1.4 million, up 89% year-over-year.
- Total Q1 GAAP net loss from continuing operations of \$4.7 million versus total GAAP net loss from continuing operations of \$2.8 million for the first quarter of 2018.
- Total Q1 adjusted EBITDA loss from continuing operations of \$4.2 million versus adjusted EBITDA loss from continuing operations of \$2.1 million for the first quarter of 2018.

* * *

Gross profit for the first quarter of 2019 increased \$1.5 million, or 68.2% year-over-year, to \$3.7 million, compared to \$2.2 million for first quarter of 2018. Gross margin for the first quarter of 2019 was 63.9%, compared to 65.1% last year. The primary drivers of the decrease in gross profit margin were Advanced Energy product mix and Advanced Energy sales outside the U.S., which represented a higher mix of total sales in the first quarter of 2019 compared to last year. OEM gross margins were lower in the first quarter of 2019 when compared to the prior year period, driven primarily by revenue related to our new Product, Manufacturing, and Supply agreements with Symmetry, which did not contribute to revenue results in the prior period.

Operating expenses from continuing operations for the first quarter of 2019 increased \$4.0 million, or 80.9% year-over-year, to \$8.9 million, compared to \$4.9 million for the first quarter of 2018. The year-over-year change in operating expenses from continuing operations was primarily driven by a \$1.4 million increase in salaries and related costs, a \$1.3 million increase in professional services costs, a \$1.0 million increase in selling,

general, and administration, and a \$0.3 million increase in research and development expenses.

Net loss from continuing operations for first quarter 2019 was \$(4.7) million, or \$(0.14) per diluted share, compared to a net loss from continuing operations of \$(2.8) million, or \$(0.08) per diluted share, for the first quarter of 2018. Total income from discontinued operations, net of tax, was \$1.9 million in the first quarter of 2018.

(Emphasis added).

29. Also on May 8, 2019, Apyx filed a Form 10-Q for the quarterly period ended March 31, 2019 with the SEC (the “1Q 2019 10-Q”), which provided the Company’s financial statements and position. The 1Q 2019 10-Q was signed by Defendants Goodwin and Semb. The 1Q 2019 10-Q contained signed SOX certifications by Defendants Goodwin and Semb attesting to the accuracy of financial reporting, the disclosure of any material changes to the Company’s internal controls over financial reporting, and the disclosure of all fraud.

30. The 1Q 2019 10-Q discussed stock-based compensation, stating in part:

Under our stock option plans, our board of directors may grant options to purchase common shares to our key employees, officers, directors and consultants. *We account for stock options in accordance with FASB ASC Topic 718, Compensation - Stock Compensation, with option expense amortized over the vesting period based on the trinomial lattice option-pricing model fair value on the grant date*, which includes a number of estimates that affect the amount of our expense. *We expensed approximately \$859,000 in stock-based compensation during the three months ended March 31, 2019*, as compared with \$372,000 for the three months ended March 31, 2018.

(Emphasis added)

31. The 1Q19 10-Q reported net loss to be \$4,681,000 and gross profit to be \$3,720,000.

32. The statements contained in ¶¶ 17-31 were materially false and/or misleading because they misrepresented and failed to disclose adverse facts pertaining to the Company’s business, operations and prospects, which were known to Defendants or recklessly disregarded

by them. Specifically, Defendants made false and/or misleading statements and/or failed to disclose that: (1) the Company not only had deficient internal controls over financial reporting, but the remediation efforts were ineffective and failed to avoid the need for a restatement of several periods of financial statements; (2) the full implications of the weaknesses in the Company's internal controls would require the restatement of financial statements; (3) the previously issued financial statements for the twelve months ended December, 31 2018 and the quarterly statements for the three and nine months ended September 30, 2018 and three months ended March 31, 2019 could no longer be relied upon and required restatement; and (4) as a result, Defendants' statements regarding the Company's business and operations were materially false and misleading and/or lacked a reasonable basis at all relevant times.

The Truth Emerges

33. On March 16, 2020, after the market closed, Apyx issued a press release announcing that past financial statements could no longer be relied upon and required restatement, stating in relevant part:

Apyx Medical Corporation to Restate Previously Issued Financial Statements

CLEARWATER, FL - MARCH 16, 2020 - Apyx Medical Corporation (NASDAQ:APYX) (the "Company"), a maker of medical devices and supplies and the developer of Helium Plasma Technology, marketed and sold as Renuvion® in the cosmetic surgery market and J-Plasma® in the hospital surgical market, today *announced it will be restating its previously issued consolidated financial statements for the twelve months ended December, 31 2018 and the quarterly statements for the three and nine months ended September 30, 2018 and three months ended March 31, 2019.* This decision was approved by the Company's Board of Directors upon the recommendation of the Company's Audit Committee, and after consultation with Management and the Company's predecessor independent registered public accounting firm.

Investors should no longer rely upon the Company's previously released financial statements for the time periods cited above. Similarly, related press releases, earnings releases, and investor communications describing the

Company's financial statements for these periods should no longer be relied upon.

The decision to restate these financial statements is based on the conclusion that the financial statements for the aforementioned financial periods cannot be relied upon as a result of the aggregation of errors identified by management and the Company's new accounting personnel during the preparation of its fiscal year 2019 Form 10-K and third quarter 2019 Form 10-Q, related to the following:

As identified during preparation of the fiscal year 2019 Form 10-K:

- The elimination of markup on intercompany sales from our subsidiary in Bulgaria

- For the three months ended March 31, 2019, the total impact included increases to both gross profit and to operating expenses of approximately \$113,000.

- The collection and remission of employee's income and payroll taxes related to the exercise of stock options in 2018 and 2019; the accrual and remission of the employer portion of payroll taxes related to those stock options exercises; reporting the incorrect amount of income to employees on their form W-2 for both non qualified and incentive stock option exercises, and misclassification of some non-qualified stock option exercises as incentive stock option exercises

- For the three and nine months ended September 30, 2018 and year ended December 31, 2018, the total aggregated impact included an increase of approximately \$51,000 to operating expenses, an increase of approximately \$713,000 to other losses and an increase to net loss of approximately \$764,000.

- For the three months ended March 31, 2019, the total aggregated impact included an increase to operating expenses of \$13,000, an increase of approximately \$300,000 to other losses and an increase to net loss of approximately \$313,000.

As previously disclosed and adjusted in Form 10-Q for the three and nine months ended September 2019 filed on November 11, 2019:

- Accounting for stock-based compensation expense (related to forfeitures, vesting periods, modifications, fair value measurements and other miscellaneous items)

- For the year ended December 31, 2018, the total impact included Increases to operating expenses, operating loss and net loss of approximately \$582,000 each.

- For the three months ended March 31, 2019, the total impact included increases to operating expenses, operating loss and net loss of approximately \$453,000 each.

- Accounting for revenue and deferred expenses related to pre-development activities in some of our OEM contracts

- For the three months ended March 31, 2019, the total impact included decreases to sales of approximately \$194,000, decreases to operating expenses of

approximately \$77,000 and increases to both operating loss and net loss of approximately \$117,000.

(Emphasis added).

34. On this news, the Company's shares fell \$0.51 per share, or over 11%, over the next two trading days to close at \$4.08 per share on March 18, 2020, damaging investors.

35. As a result of Defendants' wrongful acts and omissions, and the precipitous decline in the market value of the Company's securities, Plaintiff and other Class members have suffered significant losses and damages.

PLAINTIFF'S CLASS ACTION ALLEGATIONS

36. Plaintiff brings this action as a class action pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3) on behalf of a class consisting of all persons other than defendants who purchased or otherwise acquired Apyx securities publicly traded on NYSE or NASDAQ during the Class Period and who were damaged thereby (the "Class"). Excluded from the Class are Defendants, the officers and directors of Apyx, members of the Individual Defendants' immediate families and their legal representatives, heirs, successors or assigns and any entity in which the Individual Defendants have or had a controlling interest.

37. The members of the Class are so numerous that joinder of all members is impracticable. Throughout the Class Period, Apyx securities were actively traded on NYSE or NASDAQ. While the exact number of Class members is unknown to Plaintiff at this time and can be ascertained only through appropriate discovery, Plaintiff believes that there are hundreds, if not thousands of members in the proposed Class.

38. Plaintiff's claims are typical of the claims of the members of the Class as all members of the Class are similarly affected by defendants' wrongful conduct in violation of federal law that is complained of herein.

39. Plaintiff will fairly and adequately protect the interests of the members of the Class and has retained counsel competent and experienced in class and securities litigation. Plaintiff has no interests antagonistic to or in conflict with those of the Class.

40. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. Among the questions of law and fact common to the Class are:

- a. whether the Exchange Act was violated by Defendants' acts as alleged herein;
- b. whether statements made by Defendants to the investing public during the Class Period misrepresented material facts about the financial condition and business Apyx;
- c. whether Defendants' public statements to the investing public during the Class Period omitted material facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading;
- d. whether the Defendants caused the Company to issue false and misleading SEC filings during the Class Period;
- e. whether Defendants acted knowingly or recklessly in issuing false and SEC filing
- f. whether the prices of Apyx's securities during the Class Period were artificially inflated because of the Defendants' conduct complained of herein; and

- g. whether the members of the Class have sustained damages and, if so, what is the proper measure of damages.

41. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impracticable. Furthermore, as the damages suffered by individual Class members may be relatively small, the expense and burden of individual litigation make it impossible for members of the Class to individually redress the wrongs done to them. There will be no difficulty in the management of this action as a class action.

42. Plaintiff will rely, in part, upon the presumption of reliance established by the fraud-on-the-market doctrine in that:

- a. Apyx securities met the requirements for listing, and were listed and actively traded on NYSE or NASDAQ, a highly efficient and automated market;
- b. As a public issuer, the Company filed periodic public reports with the SEC and NYSE or NASDAQ;
- c. The Company regularly communicated with public investors via established market communication mechanisms, including through the regular dissemination of press releases via major newswire services and through other wide-ranging public disclosures, such as communications with the financial press and other similar reporting services; and
- d. The Company was followed by a number of securities analysts employed by major brokerage firms who wrote reports that were widely distributed and publicly available.

43. Based on the foregoing, the market for Apyx securities promptly digested current information regarding the Company from all publicly available sources and reflected such information in the prices of the shares, and Plaintiff and the members of the Class are entitled to a presumption of reliance upon the integrity of the market.

44. Alternatively, Plaintiff and the members of the Class are entitled to the presumption of reliance established by the Supreme Court in *Affiliated Ute Citizens of the State of Utah v. United States*, 406 U.S. 128 (1972), as Defendants omitted material information in their Class Period statements in violation of a duty to disclose such information as detailed above.

COUNT I

For Violations of Section 10(b) And Rule 10b-5 Promulgated Thereunder Against All Defendants

45. Plaintiff repeats and realleges each and every allegation contained above as if fully set forth herein.

46. This Count is asserted against Defendants based upon Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder by the SEC.

47. During the Class Period, Defendants, individually and in concert, directly or indirectly, disseminated or approved the false statements specified above, which they knew or deliberately disregarded were misleading in that they contained misrepresentations and failed to disclose material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

48. Defendants violated §10(b) of the 1934 Act and Rule 10b-5 in that they: employed devices, schemes and artifices to defraud; made untrue statements of material facts or omitted to state material facts necessary in order to make the statements made, in light of the

circumstances under which they were made, not misleading; or engaged in acts, practices and a course of business that operated as a fraud or deceit upon plaintiff and others similarly situated in connection with their purchases of Apyx securities during the Class Period.

49. Defendants acted with scienter in that they knew that the public documents and statements issued or disseminated in the name of the Company were materially false and misleading; knew that such statements or documents would be issued or disseminated to the investing public; and knowingly and substantially participated, or acquiesced in the issuance or dissemination of such statements or documents as primary violations of the securities laws. These defendants by virtue of their receipt of information reflecting the true facts of Apyx, their control over, and/or receipt and/or modification of the Company's allegedly materially misleading statements, and/or their associations with the Company which made them privy to confidential proprietary information concerning the Company, participated in the fraudulent scheme alleged herein.

50. Individual Defendants, who are the senior officers and/or directors of the Company, had actual knowledge of the material omissions and/or the falsity of the material statements set forth above, and intended to deceive Plaintiff and the other members of the Class, or, in the alternative, acted with reckless disregard for the truth when they failed to ascertain and disclose the true facts in the statements made by them or other Company personnel to members of the investing public, including Plaintiff and the Class.

51. As a result of the foregoing, the market price of Apyx securities was artificially inflated during the Class Period. In ignorance of the falsity of Defendants' statements, Plaintiff and the other members of the Class relied on the statements described above and/or the integrity

of the market price of Apyx securities during the Class Period in purchasing Apyx securities at prices that were artificially inflated as a result of Defendants' false and misleading statements.

52. Had Plaintiff and the other members of the Class been aware that the market price of Apyx securities had been artificially and falsely inflated by Defendants' misleading statements and by the material adverse information which Defendants did not disclose, they would not have purchased Apyx securities at the artificially inflated prices that they did, or at all.

53. As a result of the wrongful conduct alleged herein, Plaintiff and other members of the Class have suffered damages in an amount to be established at trial.

54. By reason of the foregoing, Defendants have violated Section 10(b) of the 1934 Act and Rule 10b-5 promulgated thereunder and are liable to the plaintiff and the other members of the Class for substantial damages which they suffered in connection with their purchase of Apyx securities during the Class Period.

COUNT II

Violations of Section 20(a) of the Exchange Act Against the Individual Defendants

55. Plaintiff repeats and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

56. During the Class Period, the Individual Defendants participated in the operation and management of the Company, and conducted and participated, directly and indirectly, in the conduct of the Company's business affairs. Because of their senior positions, they knew the adverse non-public information about Apyx's misstatement of revenue and profit and false financial statements.

57. As officers and/or directors of a publicly owned company, the Individual Defendants had a duty to disseminate accurate and truthful information with respect to the

Company's financial condition and results of operations, and to correct promptly any public statements issued by the Company which had become materially false or misleading.

58. Because of their positions of control and authority as senior officers, the Individual Defendants were able to, and did, control the contents of the various reports, press releases and public filings which the Company disseminated in the marketplace during the Class Period concerning the Company's results of operations. Throughout the Class Period, the Individual Defendants exercised their power and authority to cause the Company to engage in the wrongful acts complained of herein. The Individual Defendants therefore, were "controlling persons" of the Company within the meaning of Section 20(a) of the Exchange Act. In this capacity, they participated in the unlawful conduct alleged which artificially inflated the market price of Apyx securities.

59. By reason of the above conduct, the Individual Defendants are liable pursuant to Section 20(a) of the Exchange Act for the violations committed by The Company.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of the Class, prays for judgment and relief as follows:

(a) declaring this action to be a proper class action, designating plaintiff as Lead Plaintiff and certifying plaintiff as a class representative under Rule 23 of the Federal Rules of Civil Procedure and designating plaintiff's counsel as Lead Counsel;

(b) awarding damages in favor of plaintiff and the other Class members against all defendants, jointly and severally, together with interest thereon;

(c) awarding plaintiff and the Class reasonable costs and expenses incurred in this action, including counsel fees and expert fees; and

(d) awarding plaintiff and other members of the Class such other and further relief as the Court may deem just and proper.

JURY TRIAL DEMANDED

Plaintiff hereby demands a trial by jury.

Dated:

Respectfully submitted,

THE ROSEN LAW FIRM, P.A.

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