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Counsel for Plaintiff

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

_____, Individually and on behalf of all
others similarly situated,

Plaintiff,

v.

ORTHOPEDIATRICS CORP., MARK C.
THRODAHL, and FRED L. HITE,

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 his 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 OrthoPediatics Corp. (“OrthoPediatics” 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 class action on behalf of persons or entities who purchased or otherwise acquired publicly traded OrthoPediatrics securities between March 6, 2019 and December 30, 2020, inclusive (the “Class Period”). Plaintiff seeks to recover compensable damages caused by Defendants’ violations of the federal securities laws under the Securities Exchange Act of 1934 (the “Exchange Act”).

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 28 U.S.C. § 1331, and 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 alleged misstatements entered and the subsequent damages took place 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 OrthoPediatrics securities during the Class Period and was economically damaged thereby.

7. Defendant OrthoPediatrics purports to design, develop, and market anatomically appropriate implants and devices for the treatment of children with orthopedic conditions in the United States and internationally. OrthoPediatrics is incorporated in Delaware with headquarters at 2850 Frontier Drive, Warsaw, IN 46582. OrthoPediatrics's securities trade on NASDAQ under the ticker symbol "KIDS."

8. Defendant Mark C. Throdahl ("Throdahl") has served as the Company's Chief Executive Officer ("CEO") and President since January 2011.

9. Defendant Fred L. Hite ("Hite") has served as the Company's Chief Financial Officer ("CFO") since February 2015.

10. Defendants Throdahl and Hite are collectively referred to herein as the "Individual Defendants."

11. 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.

12. OrthoPediatrics 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.

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

14. Defendants OrthoPediatrics and the Individual Defendants are collectively referred to herein as "Defendants."

SUBSTANTIVE ALLEGATIONS
Materially False and Misleading
Statements Issued During the Class Period

15. On March 6, 2019, OrthoPediatrics issued a press release that provided financial results for the fourth quarter and full year ended December 31, 2018. The Company reported

“total revenue of \$14.6 million for fourth quarter 2018, up from \$11.7 million or 24.7% year-over-year, respectively” and “record setting [revenues of] \$57.6 million for full year 2018, up from \$45.6 million or 26.2% year-over-year, respectively.” The Company also provided “full year 2019 revenue growth guidance to be in a range of 21.0% to 23.0% and investment in consignment sets to be in a range of \$15.0 million to \$17.0 million.”

16. On March 7, 2019, OrthoPediatics filed its annual report on Form 10-K for the fiscal year ended December 31, 2018 with the SEC (the “2018 10-K”). The 2018 10-K was signed by Defendant Throdahl. Attached to the 2018 10-K were signed certifications pursuant to the Sarbanes-Oxley Act of 2002 signed by Defendants Throdahl and Hite 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.

17. The 2018 10-K stated the following concerning revenue recognition:

In the United States and in five international markets, we primarily sell our implants, and to a much lesser extent our instruments, through third-party independent sales agencies to medical facilities and hospitals. For such sales, revenue and associated cost of revenue is recognized when a product is used in a procedure. In a few cases, hospitals purchase our products for their own inventory, and such revenue and associated cost of revenue is recognized when a product is shipped or delivered and the title and risk of loss passes to the customer.

International sales are primarily through independent stocking distributors. Generally, these distributors are allowed to return products, can be thinly capitalized and in some cases do not pay for our products until they have been resold. Based on our history of collections and returns from international distributors, we have concluded that collectability is not reasonably assured. Accordingly, we recognize international revenue and associated cost of revenue when cash is received from the distributor. In the case of international sales made directly through sales agencies, we recognize revenue when our products are used by the hospital for surgeries on a case by case basis.

We have invoiced international sales to distributors that have not been recognized as revenue totaling \$0.3 million and \$1.7 million as of December 31, 2018 and 2017, respectively. Associated cost of revenue, which is reported as

inventory held by distributors on the consolidated balance sheets until the related revenue is recognized, was \$0.2 million and \$1.0 million as of December 31, 2018 and 2017, respectively.

18. On May 8, 2019, OrthoPediatrics issued a press release that provided financial results for the quarter ended March 31, 2019. The Company reported “total revenue [of] \$14.7 million for first quarter 2019, up 21.2% from \$12.1 million in first quarter 2018.” The Company also reiterated “full year 2019 revenue growth guidance to be in a range of 21.0% to 23.0% and investment in consignment sets to be in a range of \$15.0 million to \$17.0 million.”

19. On August 7, 2019, OrthoPediatrics issued a press release that provided financial results for the quarter ended June 30, 2019. The Company reported “total revenue [of] \$18.2 million for second quarter 2019, up 20.7% from \$15.1 million in second quarter 2018.” The Company also updated “full year revenue guidance from 21% to 23% growth to 23% to 25%, including Orthex.”

20. On November 7, 2019, OrthoPediatrics issued a press release that provided financial results for the quarter ended September 30, 2019. The Company reported “total revenue [of] \$20.7 million for third quarter 2019, up 31.1% from \$15.8 million in third quarter 2018.” The Company also updated “full year 2019 revenue guidance from growth in the range of 23%-25% to 24%-25%.”

21. On March 4, 2020, OrthoPediatrics issued a press release that provided financial results for the fourth quarter and full year ended December 31, 2019. The Company reported “total revenue to \$19.0 million for fourth quarter 2019, up 30.1% from \$14.6 million in fourth quarter 2018, driving consecutive year of annual record setting revenue of \$72.6 million for full year 2019, up from \$57.6 million or 26.0% year-over-year.” The Company also provided “full year 2020 revenue guidance of growth in the range of 22%-24% and investment in consignment

sets to be in a range of \$19-\$21 million.”

22. On March 5, 2020, OrthoPediatrics filed its annual report on Form 10-K for the fiscal year ended December 31, 2019 with the SEC (the “2020 10-K”). The 2020 10-K was signed by Defendant Throdahl. Attached to the 2020 10-K were signed SOX certifications signed by Defendants Throdahl and Hite 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.

23. The 2019 10-K stated the following concerning revenue recognition:

In the United States and in seven international markets, we primarily sell our implants, and to a much lesser extent our instruments, through third-party independent sales agencies to medical facilities and hospitals. For such sales, revenue and associated cost of revenue is recognized when a product is used in a procedure. In a few cases, hospitals purchase our products for their own inventory, and such revenue and associated cost of revenue is recognized when a product is shipped or delivered and the title and risk of loss passes to the customer.

Outside of the United States, we primarily sell our products through independent stocking distributors. Generally, the distributors are allowed to return products, and some are thinly capitalized. Based on our history of collections and returns from international customers, prior to 2019, we concluded that collectibility was not reasonably assured at the time of delivery for certain customers who had not evidenced a consistent pattern of timely payment. Accordingly, in the past we did not recognize international revenue and associated cost of revenue at the time title transfers for these customers for whom collectibility had not been deemed probable based on the customer’s history and ability to pay, but rather when cash had been received. Until such payment, cost of revenue was recorded as inventories held by international distributors, net of adjustment for estimated unreturnable inventory, on our consolidated balance sheets.

Following a review of our collection history, we deemed collectibility was probable for all international stocking distributors effective January 1, 2019. Based on a history of reliable collections, we have concluded that a contract exists and revenue should be recognized when we transfer control of our products to the customer, generally upon implantation or when title passes upon shipment.

24. On May 5, 2020, OrthoPediatrics issued a press release that provided financial

results for the quarter ended March 31, 2020. The Company reported “of \$16.4 million for first quarter 2020, up 11.6% from \$14.7 million in first quarter 2019; domestic revenue growth was 30.4% for the first quarter 2020.”

25. On August 5, 2020, OrthoPediatics issued a press release that provided financial results for the quarter ended June 30, 2020. The Company reported “total revenue of \$13.6 million for second quarter 2020, down 25.3% from \$18.2 million in second quarter 2019 driven primarily by the impact of the COVID-19 pandemic; U.S. revenue decline was 12.3% for the second quarter 2020 compared to the second quarter 2019.”

26. On November 4, 2020, OrthoPediatics issued a press release that provided financial results for the quarter ended September 30, 2020. The Company reported “total revenue of \$22.2 million for third quarter 2020, up 7.0% from \$20.7 million in third quarter 2019, and saw continued progress of underlying demand trends in the U.S.” The Company also reported “U.S. revenue growth of 16.7% during the third quarter 2020 compared to the third quarter 2019.”

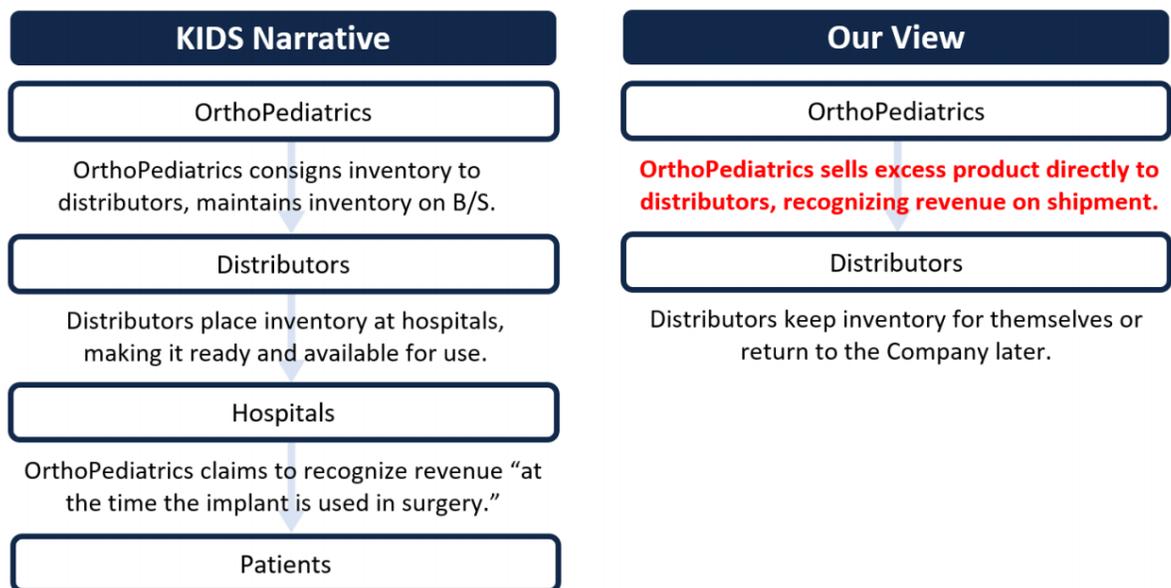
27. The statements contained in ¶¶15-26 were materially false and/or misleading because they misrepresented and failed to disclose the following adverse facts pertaining to the Company’s business, operations and prospects, which were known to Defendants or recklessly disregarded by them. Specifically, Defendants made false and/or misleading statements and/or failed to disclose that: (1) OrthoPediatics engaged in a channel-stuffing scheme by selling products to distributors via inducements such as equity-based awards, opportunity to return products, and/or product discounts or increased commission; (2) as a result of the scheme, OrthoPediatics overstated its revenues; (3) OrthoPediatics’s organic growth was lower than

touted; and (4) as a result, Defendants’ statements about its business, operations, and prospects, were materially false and misleading and/or lacked a reasonable basis at all relevant times.

THE TRUTH BEGINS TO EMERGE

28. On December 2, 2020, Culper Research published a reported entitled “OrthoPediatics Corp. (KIDS): Even Channel Stuffing Can’t Save This Company.” The report alleged that the Company “engaged in a channel stuffing scheme that has systematically and significantly overstated revenues,” was structurally broken, and had lied to investors about its slowing growth.

29. According to the report, the Company artificially inflated revenues by shipping excess products to distributors. The Company then was “allowing revenue recognition upon shipment to artificially inflate revenues by selling and shipping excess product directly to distributors.” The scheme is illustrated in the following graphic:



30. Culper Research interviewed several individuals at the Company’s distributors, who confirmed that they bought products and the Company’s request, and that the Company

“offers distributors (a) equity-based awards, (b) the opportunity to return product, and/or (c) increased commission schedules effectively in exchange for these orders.” According to the report, the sources described these practices as “frequent and pervasive in nature.”

31. Also according to the report, the Company was structurally broken, and “has been consigning more and more inventory, it has converted that inventory to revenues at a slower pace; days inventory reached 1,135 days in the most recent quarter.”

32. On this news, OrthoPediatrics shares fell \$4.12 per share, or 9%, to close at \$41.02 per share on December 2, 2020, damaging investors.

33. On December 30, 2020, during market hours, Culper Research tweeted that "a recent [Freedom of Information Act] request suggests that the Company is under an active SEC investigation," citing a letter from the SEC that it withheld certain records pursuant to an exemption that "protects from disclosure records compiled for law enforcement purposes, the release of which could reasonably be expected to interfere with enforcement activities."

34. On this news, OrthoPediatrics shares fell \$2.81, or 6%, to close at \$43.57 per share on December 30, 2020, damaging investors.

35. On December 30, 2020, after market hours, OrthoPediatrics filed a Form 8-K with the SEC, where it “confirmed that it is in the process of responding to a non-public, fact-finding inquiry from the U.S. Securities and Exchange Commission (the “SEC”) as part of an informal review that commenced on December 15, 2020.” The Company stated that the investigation had been initiated following Culper Research’s report.

36. On this news, OrthoPediatrics shares fell \$2.32, or 5%, to close at \$41.25 per share on December 31, 2020, damaging investors.

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

PLAINTIFF'S CLASS ACTION ALLEGATIONS

38. 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 acquired OrthoPediatics securities publicly traded on NASDAQ during the Class Period, and who were damaged thereby (the "Class"). Excluded from the Class are Defendants, the officers and directors of OrthoPediatics, members of the Individual Defendants' immediate families and their legal representatives, heirs, successors or assigns and any entity in which Officer or Director Defendants have or had a controlling interest.

39. The members of the Class are so numerous that joinder of all members is impracticable. Throughout the Class Period, OrthoPediatics securities were actively traded on 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.

40. 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.

41. 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.

42. 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:

- whether the Exchange Act were violated by Defendants' acts as alleged herein;
- whether statements made by Defendants to the investing public during the Class Period misrepresented material facts about the financial condition and business OrthoPediatics;
- 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;
- whether the Defendants caused OrthoPediatics to issue false and misleading SEC filings during the Class Period;
- whether Defendants acted knowingly or recklessly in issuing false and SEC filing
- whether the prices of OrthoPediatics securities during the Class Period were artificially inflated because of the Defendants' conduct complained of herein; and
- whether the members of the Class have sustained damages and, if so, what is the proper measure of damages.

43. 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.

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

- OrthoPediatrics shares met the requirements for listing, and were listed and actively traded on NASDAQ, a highly efficient and automated market;
- As a public issuer, OrthoPediatrics filed periodic public reports with the SEC and NASDAQ;
- OrthoPediatrics 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
- OrthoPediatrics was followed by a number of securities analysts employed by major brokerage firms who wrote reports that were widely distributed and publicly available.

45. Based on the foregoing, the market for OrthoPediatrics securities promptly digested current information regarding OrthoPediatrics 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.

46. 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

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

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

49. 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.

50. 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 OrthoPediatics securities during the Class Period.

51. Defendants acted with scienter in that they knew that the public documents and statements issued or disseminated in the name of OrthoPediatics 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 OrthoPediatrics, their control over, and/or receipt and/or modification of OrthoPediatrics's allegedly materially misleading statements, and/or their associations with the Company which made them privy to confidential proprietary information concerning OrthoPediatrics, participated in the fraudulent scheme alleged herein.

52. 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 OrthoPediatrics personnel to members of the investing public, including Plaintiff and the Class.

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

54. Had Plaintiff and the other members of the Class been aware that the market price of OrthoPediatrics 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 OrthoPediatrics securities at the artificially inflated prices that they did, or at all.

55. 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.

56. 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 OrthoPediatrics securities during the Class Period.

COUNT II

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

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

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

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

60. 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 OrthoPediatrics disseminated in the marketplace during the

Class Period concerning OrthoPediatics’s results of operations. Throughout the Class Period, the Individual Defendants exercised their power and authority to cause OrthoPediatics to engage in the wrongful acts complained of herein. The Individual Defendants therefore, were “controlling persons” of OrthoPediatics 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 OrthoPediatics securities.

61. 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 OrthoPediatics.

PRAYER FOR RELIEF

WHEREFORE, plaintiff, on behalf of himself and 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;

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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