

UNITED STATES DISTRICT COURT  
DISTRICT OF DELAWARE

ANTHONY FRANCHI,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. _____
	)	
GENMARK DIAGNOSTICS, INC., KEVIN	)	
C. O'BOYLE, DARYL J. FAULKNER,	)	
JAMES FOX, LISA M. GILES, and	)	<b>COMPLAINT FOR VIOLATIONS OF</b>
MICHAEL S. KAGNOFF,	)	<b>THE FEDERAL SECURITIES LAWS</b>
	)	
Defendants.	)	JURY TRIAL DEMANDED
	)	

Plaintiff Anthony Franchi ("Plaintiff"), by and through his undersigned counsel, for his complaint against defendants, alleges upon personal knowledge with respect to himself, and upon information and belief based upon, *inter alia*, the investigation of counsel as to all other allegations herein, as follows:

**NATURE OF THE ACTION**

1. Plaintiff brings this action against GenMark Diagnostics, Inc. ("GenMark" or the "Company") and the members of its Board of Directors (the "Board" or the "Individual Defendants") for their violations of Sections 14(d)(4), 14(e) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §§ 78n(d)(4), 78n(e), 78t(a), and U.S. Securities and Exchange Commission ("SEC") Rule 14d-9, 17 C.F.R. §240.14d-9(d) ("Rule 14d-9"). By the Action, Plaintiff seeks to enjoin the expiration of a tender offer (the "Tender Offer") on a proposed transaction, pursuant to which GenMark will be acquired by Roche Holdings, Inc. ("Roche"), through Roche's wholly-owned subsidiary Geronimo Acquisition Corp. ("Merger Sub") (the "Proposed Transaction").<sup>1</sup>

<sup>1</sup> Non-party Roche is a Delaware corporation affiliated with The Roche Group, which is



2. On March 15, 2021, GenMark and Roche jointly announced their entry into an Agreement and Plan of Merger (the “Merger Agreement”) dated March 12, 2021, to sell GenMark to Roche. Under the terms of the Merger Agreement, Roche will acquire all of the outstanding shares of GenMark common stock for \$24.05 in cash per share of GenMark common stock (the “Offer Price”). Pursuant to the Merger Agreement, Purchaser commenced the Tender Offer on March 25, 2021. The Tender Offer is scheduled to expire at 12:00 midnight, New York City time, at the end of April 21, 2021. The Proposed Transaction is valued at approximately \$1.8 billion.

3. On March 25, 2021, GenMark filed a Solicitation/Recommendation Statement on Schedule 14D-9 (the “Recommendation Statement”) that recommends GenMark stockholders tender their shares in favor of the Proposed Transaction. The Recommendation Statement, however, omits or misrepresents material information concerning, among other things: (a) GenMark’s financial projections and the data and inputs underlying the financial valuation analyses that support the fairness opinion provided by the Company’s financial advisor, J.P. Morgan Securities LLC (“J.P. Morgan”); (b) the background leading to the Proposed Transaction; and (c) Company insiders’ potential conflicts of interest. Defendants authorized the issuance of the false and misleading Recommendation Statement in violation of Sections 14(e) and 20(a) of the Exchange Act.

4. It is imperative that the material information omitted from the Recommendation Statement is disclosed to the Company’s stockholders prior to the close of the Tender Offer, so they can make a fair and fully informed decision as to whether they should tender their shares or potentially seek appraisal.

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headquartered in Basel, Switzerland. Non-party Merger Sub is a Delaware corporation and wholly owned subsidiary of Roche.

5. For these reasons and as set forth in detail herein, Plaintiff seeks to enjoin Defendants from taking any steps to consummate the Proposed Transaction unless and until the material information discussed below is disclosed to the Company's stockholders or, in the event the Proposed Transaction is consummated, to recover damages resulting from the defendants' violations of the Exchange Act.

### **JURISDICTION AND VENUE**

6. This Court has jurisdiction over the claims asserted herein for violations of Sections 14(e) and 20(a) of the Exchange Act pursuant to Section 27 of the Exchange Act, 15 U.S.C. § 78aa, and 28 U.S.C. § 1331 (federal question jurisdiction).

7. This Court has jurisdiction over the defendants because each defendant is either a corporation that conducts business in and maintains operations within this District, or is an individual with sufficient minimum contacts with this District so as to make the exercise of jurisdiction by this Court permissible under traditional notions of fair play and substantial justice.

8. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because defendants are found or are inhabitants or transact business in this District.

### **PARTIES**

9. Plaintiff is, and has been at all times relevant hereto, a continuous stockholder of GenMark.

10. Defendant GenMark is a Delaware corporation with its principal executive offices located at 5964 La Place Court, Carlsbad, California 92008. GenMark provides multiplex molecular diagnostic solutions designed to enhance patient care, improve key quality metrics and reduce the total cost-of-care. GenMark's common stock is traded on the NASDAQ Global Market under the ticker symbol "GNMK."

11. Defendant Kevin C. O'Boyle ("O'Boyle") has been Chairman of the Board since February 2020 and a director of the Company since March 2010.

12. Defendant Daryl J. Faulkner ("Faulkner") has been a director of the Company since March 2010.

13. Defendant James Fox ("Fox") has been a director of the Company since September 2010. Defendant Fox previously served as Chairman of the Board from August 2014 to February 2020.

14. Defendant Lisa M. Giles ("Giles") has been a director of the Company since March 2015.

15. Defendant Michael S. Kagnoff ("Kagnoff") has been a director of the Company since March 2015.

16. Defendants identified in paragraphs 11 to 15 are collectively referred to herein as the "Board" or the "Individual Defendants."

### **The Proposed Transaction**

17. On March 15, 2021, GenMark and Roche jointly announced, in relevant part:

Basel, 15 March 2021 - Roche (SIX: RO, ROG; OTCQX: RHHBY) and GenMark Diagnostics (NASDAQ: GNMK) today announced that they have entered into a definitive merger agreement for Roche to fully acquire GenMark at a price of US\$ 24.05 per share in an all-cash transaction. This corresponds to a total transaction value of approximately US\$ 1.8 billion on a fully diluted basis. This price represents a premium of approximately 43% to GenMark's unaffected closing share price on February 10, 2021, the last trading day before a media report was published speculating about a potential sale process. The merger agreement has been unanimously approved by the boards of directors of GenMark and Roche. Once the acquisition is completed, GenMark's principal operations will continue at its current location in Carlsbad, California, USA.

Under the terms of the merger agreement, Roche will promptly commence a tender offer to acquire all outstanding shares of GenMark's common stock, and GenMark will file a recommendation statement containing the unanimous recommendation of the GenMark board that GenMark stockholders tender their shares to Roche.

GenMark's syndromic panel testing portfolio will complement Roche's current molecular diagnostics portfolio and the Roche global network will enable expanded reach for GenMark's products. GenMark's ePlex system drives lab efficiency through streamlined order-to-reporting workflow and enables better patient outcomes by rapidly diagnosing a patient's symptoms. Infectious diseases are a leading cause of death globally, and earlier detection of the cause of an infection has been shown to improve patient outcomes and improve key hospital initiatives such as antibiotic stewardship and length of stay.

"Acquiring GenMark Diagnostics will broaden our molecular diagnostics portfolio to include solutions that can provide lifesaving information quickly to patients and their healthcare providers in the fight against infectious diseases," said Thomas Schinecker, CEO Roche Diagnostics. "Their proven expertise in syndromic panel testing provides faster targeted therapeutic intervention, resulting in improved patient outcomes and reduced hospital stays, and will contribute to Roche's commitment to helping control infectious diseases and antibiotic resistance. The rapid identification of bloodstream infections and the detection of antimicrobial resistance genes are more essential than ever for hospitals and their patients."

"As a part of Roche, we can accelerate our mission to enable rapid diagnosis of infectious disease to improve patient outcomes. Together with Roche's diagnostics healthcare solutions, we will be able to provide a full suite of molecular diagnostic solutions to customers around the world," said Scott Mendel, CEO of GenMark Diagnostics. "We are thrilled to become a part of Roche and are confident that this is the right path forward for GenMark and our customers."

GenMark's Respiratory Pathogen Panels identify the most common viral and bacterial organisms associated with upper respiratory infection, including SARS-CoV-2, complementing Roche's extensive portfolio of COVID-19 diagnostics solutions.

#### **Terms of the Agreement**

Under the terms of the merger agreement, Roche will promptly commence a tender offer to acquire all of the outstanding shares of GenMark's common stock for US\$ 24.05 per share in cash. Following the completion of the tender offer, Roche will acquire all remaining shares at the same price of US\$ 24.05 per share in cash through a second step merger.

The transaction is expected to close in the 2nd quarter of 2021 and is subject to customary closing conditions, including the tender of at least a majority of the outstanding shares of GenMark's common stock and the expiration or termination of the waiting period under the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

#### **The Recommendation Statement Contains Material Misstatements or Omissions**

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