

UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

SCHEDULE TO

Tender Offer Statement Under Section 14(d)(1) or 13(e)(1)  
of the Securities Exchange Act of 1934  
(Amendment No. 1)

GENMARK DIAGNOSTICS, INC.

(Name of Subject Company)

GERONIMO ACQUISITION CORP.

A wholly owned subsidiary of

ROCHE HOLDINGS, INC.

(Names of Filing Persons – Offeror)

Common Stock, Par Value \$0.0001 Per Share  
(Title of Class of Securities)

372309104

(CUSIP Number of Class of Securities)

Bruce Resnick  
Roche Holdings, Inc.

1 DNA, MS #24,

South San Francisco, CA 94080

Telephone: (650) 225-1000

(Name, Address and Telephone Number of Person Authorized to Receive Notices and Communications on Behalf of Filing Persons)

Copies to:

Sharon R. Flanagan

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555 California Street

San Francisco, California 94104

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CALCULATION OF FILING FEE

Transaction Valuation*	Amount of Filing Fee**
\$1,831,626,346	\$199,830

\* Estimated solely for purposes of calculating the filing fee pursuant to Rule 0-11(d) under the Securities Exchange Act of 1934, as amended (the “Exchange Act”). The Transaction Value was calculated by adding (i) the product of (A) 73,596,658 outstanding shares (“Shares”) of common stock of GenMark Diagnostics, Inc. (“GenMark”), and (B) \$24.05 (the “Offer Price”); (ii) the product of (A) 693,995 Shares subject to issuance pursuant to outstanding GenMark stock options and (B) \$12.71, which is the difference between the \$24.05 per share tender offer price and \$11.34, the average weighted exercise price of such options (all of which are “in-the-money”); (iii) the product of (A) outstanding restricted stock units in respect of 3,439,519 Shares subject to such restricted stock units (with any applicable performance conditions deemed to be achieved at maximum performance) and (B) the Offer Price; and (iv) the product of (A) 52,009 Shares which are estimated to be subject to outstanding purchase rights under the Company’s employee stock purchase price and (B) the Offer Price. The foregoing figures have been provided by GenMark to the offerors as of March 19, 2021, the most recent practicable date.

\*\* The amount of the filing fee is calculated in accordance with Rule 0-11 of the Securities Exchange Act of 1934, as amended, and Fee Rate Advisory #1 for Fiscal Year 2021, issued August 26, 2020, by multiplying the transaction valuation by 0.0001091.

Check box if any part of the fee is offset as provided by Rule 0-11(a)(2) and identify the filing with which the offsetting fee was previously paid. Identify the previous filing by registration statement number, or the Form or Schedule and the date of its filing.

Amount Previously Paid:  
Form or Registration No.:

\$199,830  
Schedule TO

Filing Party:  
Date Filed:

Roche Holdings, Inc.  
March 25, 2021

Check the box if the filing relates solely to preliminary communications made before the commencement of a tender offer.

Check the appropriate boxes below to designate any transactions to which the statement relates:

- third-party tender offer subject to Rule 14d-1.
- issuer tender offer subject to Rule 13e-4.
- going-private transaction subject to Rule 13e-3.
- amendment to Schedule 13D under Rule 13d-2.

Check the following box if the filing is a final amendment reporting the results of the tender offer.

If applicable, check the appropriate box(es) below to designate the appropriate rule provision(s) relied upon:

- Rule 13e-4(i) (Cross-Border Issuer Tender Offer)
  - Rule 14d-1(d) (Cross-Border Third-Party Tender Offer)
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This Amendment No. 1 (“**Amendment No. 1**”) to the Tender Offer Statement on Schedule TO (together with the exhibits thereto, the “**Schedule TO**”) amends and supplements the statement originally filed on March 25, 2021 by Roche Holdings, Inc., a Delaware corporation (“**Parent**”), and Geronimo Acquisition Corp., a Delaware corporation and wholly owned subsidiary of Parent (“**Purchaser**”). This Amendment No. 1 and the Schedule TO relate to the offer by Purchaser to purchase all outstanding shares of common stock, par value \$0.0001 per share (the “**Shares**”), of GenMark Diagnostics, Inc., a Delaware corporation (“**GenMark**”), at a purchase price of \$24.05 per Share, net to the seller in cash, without interest and subject to deduction for any required withholding taxes, upon the terms and subject to the conditions set forth in the Offer to Purchase, dated March 25, 2021 (as amended or supplemented from time to time, the “**Offer to Purchase**”), and in the related Letter of Transmittal (the “**Letter of Transmittal**,” which, together with any amendments or supplements thereto from time to time, constitutes the “**Offer**”). The initial expiration date of the Offer is at 12:00 midnight, Eastern Time, at the end of the day on Wednesday, April 21, 2021, unless the offer is extended or earlier terminated as permitted by the Merger Agreement and applicable law.

Capitalized terms used, but not otherwise defined, in this Amendment No. 1 shall have the meanings ascribed to them in the Offer to Purchase. Except as set forth below, the information set forth in the Schedule TO remains unchanged and is incorporated herein by reference as relevant to the items in this Amendment No. 1.

#### **Items 1 through 9, and Item 11.**

Items 1 through 9 and 11 of the Schedule TO are hereby amended and supplemented as follows:

The section under the heading “16. Certain Legal Matters; Regulatory Approvals” is hereby amended and supplemented by inserting after the last paragraph of such section the following new subsection:

#### *“Litigation Related to the Merger*

On March 29, 2021, Plaintiff Ernest Mancini (“**Plaintiff Mancini**”) filed a lawsuit captioned Ernest Mancini v. GenMark Diagnostics, Inc., et al., No. 1:21-cv-466, against GenMark, its directors Kevin C. O’Boyle, Daryl J. Faulkner, James Fox, Lisa Giles and Michael Kagnoff (collectively, the “**Individual Defendants**”), Parent and Purchaser (with Parent, Purchaser, GenMark and the Individual Defendants, collectively the “**Defendants**”) in the United States District Court for the District of Delaware. On April 6, 2021, Plaintiff Alex Ciccotelli (“**Plaintiff Ciccotelli**”) filed a lawsuit captioned Alex Ciccotelli v. GenMark Diagnostics, Inc., et al., No. 2:21-cv-01626, against Defendants in the United States District Court for the Eastern District of Pennsylvania. In these complaints, Plaintiffs Mancini and Ciccotelli allege that the Defendants violated Sections 14(d)(4) and 14(e) of the Exchange Act and the SEC Rule 14a-9, and that the Individual Defendants, Parent, and Purchaser violated Section 20(a) of the Exchange Act, based upon alleged material misstatements or omissions in the Recommendation Statement relating to (a) the GenMark financial projections made in connection with Parent and Purchaser’s proposed acquisition of GenMark (the “**Proposed Transaction**”), (b) the financial analysis of J.P. Morgan, (c) the existence of nondisclosure agreements with certain provisions, and/or (d) the existence of or purported potential conflicts of interest concerning the Proposed Transaction. The complaints include demands for, among other things, an injunction preventing the Defendants from closing the Proposed Transaction, or rescinding or setting aside the Proposed Transaction or awarding rescission damages to Plaintiffs if the Proposed Transaction is consummated. The foregoing description does not purport to be complete and is qualified in its entirety by reference to the complaints, which are attached hereto as Exhibit (a)(5)(vi) and Exhibit (a)(5)(xiii), and are incorporated herein by reference.

Six additional cases have been filed which name as defendants GenMark and the Individual Defendants only. On March 26, 2021, Plaintiff Shiva Stein (“**Plaintiff Stein**”) filed a lawsuit captioned Shiva Stein v. GenMark Diagnostics, Inc., et al., No. 1:21-cv-00454-MN, and on April 5, 2021, Plaintiff Anthony Franchi (“**Plaintiff Franchi**”) filed a lawsuit captioned Anthony Franchi v. GenMark Diagnostics, Inc., et al., (case number not yet assigned), both in the United States District Court for the District of Delaware. On March 31, 2021, Plaintiff Dennis Evangelista (“**Plaintiff Evangelista**”) filed a lawsuit captioned Dennis Evangelista v. GenMark Diagnostics, Inc., et al., No. 21CV0567-BEN-JLB, and on April 2, 2021, Plaintiff Bryan Anderson (“**Plaintiff Anderson**”) filed a lawsuit captioned Bryan Anderson v. GenMark Diagnostics, Inc., et al., No. 21CV0576-BEN-JLB, both in the United States District Court for the Southern District of California. On April 5, 2021, Plaintiff Rick Turpin (“**Plaintiff Turpin**”) filed a lawsuit captioned Rick Turpin v. GenMark Diagnostics, Inc., et al., 1:21-cv-01840 in United States District Court for the Eastern District of New York. On April 6, 2021, Plaintiff Allan Wanamaker (“**Plaintiff Wanamaker**”) filed a lawsuit captioned Allan Wanamaker v. GenMark Diagnostics, Inc., et al., No. 1:21-cv-02909 in United States District Court for the Southern District of New York. In these complaints, Plaintiffs Stein, Franchi, Evangelista, Anderson, Turpin, and Wanamaker allege that GenMark and the Individual Defendants violated Sections 14(d)(4) and 14(e) of the Exchange Act and the SEC Rule 14a-9, and that the Individual Defendants violated Section 20(a) of the Exchange Act, based upon alleged material misstatements or omissions in the Recommendation Statement relating to (a) the financial projections made in connection with the Proposed Transaction, (b) the financial analysis of J.P. Morgan, (c) the existence of nondisclosure agreements with certain provisions, and/or (d) background, process, and/or purported potential conflicts of interest concerning the Proposed Transaction. The complaints include demands for, among other things, an injunction preventing the Defendants from closing the Proposed Transaction. Plaintiffs Stein, Franchi, Anderson and Turpin alternatively demand rescinding the Proposed Transaction or awarding rescission damages to Plaintiffs if the Proposed Transaction is consummated. The foregoing description does not purport to be complete and is qualified in its entirety by reference to the complaints, which are attached hereto as Exhibits (a)(5)(vii) through (a)(5)(xii) and are incorporated herein by reference.

Additional lawsuits may be filed against GenMark, Parent or Purchaser and/or any of their respective affiliates or directors in connection with the transactions contemplated by the Merger Agreement.”

**Item 12. Exhibits.**

Item 12 of the Schedule TO is hereby amended and supplemented by adding the following exhibits thereto:

<u>Exhibit No.</u>	<u>Description</u>
(a)(5)(vi)	Complaint filed by Ernest Mancini, on March 29, 2021, in the United States District Court, District of Delaware.
(a)(5)(vii)	Complaint filed by Shiva Stein, on March 26, 2021, in the United States District Court, District of Delaware.
(a)(5)(viii)	Complaint filed by Dennis Evangelista, on March 31, 2021, in the United States District Court, District of Southern California.
(a)(5)(ix)	Complaint filed by Bryan Anderson, on April 2, 2021, in the United States District Court, District of Southern California.
(a)(5)(x)	Complaint filed by Anthony Franchi, on April 5, 2021, in the United States District Court, District of Delaware.
(a)(5)(xi)	Complaint filed by Rick Turpin, on April 5, 2021, in the United States District Court, Eastern District of New York.
(a)(5)(xii)	Complaint filed by Allan Wanamaker, on April 6, 2021, in the United States District Court, Southern District of New York.
(a)(5)(xiii)	Complaint filed by Alex Ciccotelli, on April 6, 2021, in the United States District Court, Eastern District of Pennsylvania.

**SIGNATURES**

After due inquiry and to the best knowledge and belief of the undersigned, each of the undersigned certifies that the information set forth in this statement is true, complete and correct.

Date: April 6, 2021

GERONIMO ACQUISITION CORP.

By: /s/ Bruce Resnick

Name: Bruce Resnick

Title: Vice President, Treasurer and Assistant  
Secretary

ROCHE HOLDINGS, INC.

By: /s/ Bruce Resnick

Name: Bruce Resnick

Title: Vice President

## Exhibit Index

<u>Exhibit No.</u>	<u>Description</u>
(a)(1)(i)†	Offer to Purchase, dated as of March 25, 2021.
(a)(1)(ii)†	Letter of Transmittal (including IRS Form W-9).
(a)(1)(iii)†	Notice of Guaranteed Delivery.
(a)(1)(iv)†	Letter to Brokers, Dealers, Commercial Banks, Trust Companies and Other Nominees.
(a)(1)(v)†	Letter to Clients for use by Brokers, Dealers, Commercial Banks, Trust Companies and Other Nominees.
(a)(1)(vi)†	Summary Advertisement as published in the <i>Wall Street Journal</i> on March 25, 2021.
(a)(5)(i)†	Joint Media Release issued by Roche and GenMark on March 15, 2021 (incorporated by reference to Exhibit 99.1 of the Roche Holdings, Inc. Pre-Commencement Communication on Schedule TO filed with the Commission on March 15, 2021).
(a)(5)(ii)†	Q&A Acquisition of GenMark Diagnostics, Inc. dated March 15, 2021 (incorporated by reference to Exhibit 99.2 of the Roche Holdings, Inc. Pre-Commencement Communication on Schedule TO filed with the Commission on March 15, 2021).
(a)(5)(iii)†	Social media content by F. Hoffmann-La Roche Ltd on www.twitter.com (incorporated by reference to Exhibit 99.2 of the Roche Holdings, Inc. Pre-Commencement Communication on Schedule TO filed with the Commission on March 15, 2021).
(a)(5)(iv)†	Social media content by Roche Diagnostics on www.twitter.com (incorporated by reference to Exhibit 99.1 of the Roche Holdings, Inc. Pre-Commencement Communication on Schedule TO filed with the Commission on March 17, 2021).
(a)(5)(v)†	Social media content by F. Hoffmann-La Roche Ltd on www.twitter.com (incorporated by reference to Exhibit 99.1 of the Roche Holdings, Inc. Pre-Commencement Communication on Schedule TO filed with the Commission on March 18, 2021).
(a)(5)(vi)*	Complaint filed by Ernest Mancini, on March 29, 2021, in the United States District Court, District of Delaware.
(a)(5)(vii)*	Complaint filed by Shiva Stein, on March 26, 2021, in the United States District Court, District of Delaware.
(a)(5)(viii)*	Complaint filed by Dennis Evangelista, on March 31, 2021, in the United States District Court, District of Southern California.
(a)(5)(ix)*	Complaint filed by Bryan Anderson, on April 2, 2021, in the United States District Court, District of Southern California.
(a)(5)(x)*	Complaint filed by Anthony Franchi, on April 5, 2021, in the United States District Court, District of Delaware.
(a)(5)(xi)*	Complaint filed by Rick Turpin, on April 5, 2021, in the United States District Court, Eastern District of New York.
(a)(5)(xii)*	Complaint filed by Allan Wanamaker, on April 6, 2021, in the United States District Court, Southern District of New York.
(a)(5)(xiii)*	Complaint filed by Alex Ciccotelli, on April 6, 2021, in the United States District Court, Eastern District of Pennsylvania.
(b)	Not applicable.
(d)(1)†	Agreement and Plan of Merger, dated as of March 12, 2021, among Roche Holdings, Inc., Geronimo Acquisition Corp. and GenMark Diagnostics, Inc. (incorporated by reference to Exhibit 2.1 of the GenMark Diagnostics, Inc. Current Report on Form 8-K (File No. 001-34753) filed with the Commission on March 15, 2021).
(d)(2)†	Confidentiality Agreement, dated as of February 19, 2020, as amended as of February 1, 2021, between Roche Holdings, Inc. and GenMark Diagnostics, Inc.
(g)	Not applicable.
(h)	Not applicable.

\* Filed herewith

† Previously filed.

**UNITED STATES DISTRICT COURT  
DISTRICT OF DELAWARE**

ERNEST MANCINI,	)	
	)	
Plaintiff,	)	
	)	Case No. _____
v.	)	
	)	JURY TRIAL DEMANDED
GENMARK DIAGNOSTICS, INC., KEVIN	)	
C. O'BOYLE, DARYL J. FAULKNER,	)	
JAMES FOX, LISA GILES, MICHAEL	)	
KAGNOFF, ROCHE HOLDINGS, INC., and	)	
GERONIMO ACQUISITION CORP.,	)	
	)	
Defendants.	)	

**COMPLAINT FOR VIOLATION OF THE SECURITIES EXCHANGE ACT OF 1934**

Plaintiff, by his undersigned attorneys, for this 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. This action stems from a proposed transaction announced on March 15, 2021 (the "Proposed Transaction"), pursuant to which GenMark Diagnostics, Inc. ("GenMark" or the "Company") will be acquired by Roche Holdings, Inc. ("Parent") and Geronimo Acquisition Corp. ("Merger Sub," and together with Parent, "Roche").

2. On March 12, 2021, GenMark's Board of Directors (the "Board" or "Individual Defendants") caused the Company to enter into an agreement and plan of merger (the "Merger Agreement") with Roche. Pursuant to the terms of the Merger Agreement, Merger Sub commenced a tender offer (the "Tender Offer") to purchase all of GenMark's outstanding common stock for \$24.05 in cash per share. The Tender Offer is set to expire on April 21, 2021.

3. On March 25, 2021, defendants filed a Solicitation/Recommendation Statement (the “Solicitation Statement”) with the United States Securities and Exchange Commission (“SEC”) in connection with the Proposed Transaction.

4. The Solicitation Statement omits material information with respect to the Proposed Transaction, which renders the Solicitation Statement false and misleading. Accordingly, plaintiff alleges herein that defendants violated Sections 14(e), 14(d), and 20(a) of the Securities Exchange Act of 1934 (the “1934 Act”) in connection with the Solicitation Statement.

#### **JURISDICTION AND VENUE**

5. This Court has jurisdiction over all claims asserted herein pursuant to Section 27 of the 1934 Act because the claims asserted herein arise under Sections 14(e), 14(d), and 20(a) of the 1934 Act and Rule 14a-9.

6. This Court has jurisdiction over 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.

7. Venue is proper under 28 U.S.C. § 1391 because a substantial portion of the transactions and wrongs complained of herein occurred in this District.

#### **PARTIES**

8. Plaintiff is, and has been continuously throughout all times relevant hereto, the owner of GenMark common stock.

9. Defendant GenMark is a Delaware corporation and maintains its principal executive offices at 5964 La Place Court, Carlsbad, California 92008. GenMark’s common stock trades on the NASDAQ under the ticker symbol “GNMK.”

10. Defendant Kevin C. O’Boyle is Chairman of the Board of the Company.

11. Defendant Daryl J. Faulkner is a director of the Company.
12. Defendant James Fox is a director of the Company.
13. Defendant Lisa Giles is a director of the Company.
14. Defendant Michael Kagnoff is a director of the Company.
15. The defendants identified in paragraphs 10 through 14 are collectively referred to herein as the “Individual Defendants.”
16. Defendant Parent is a Delaware corporation and a party to the Merger Agreement.
17. Defendant Merger Sub is a Delaware corporation, a wholly-owned subsidiary of Parent, and a party to the Merger Agreement.

### **SUBSTANTIVE ALLEGATIONS**

#### ***Background of the Company and the Proposed Transaction***

18. GenMark is a leading provider of multiplex molecular diagnostic solutions designed to enhance patient care, improve key quality metrics, and reduce the total cost-of-care.

19. Utilizing GenMark’s proprietary eSensor® detection technology, GenMark’s eSensor XT-8® and ePlex® systems are designed to support a broad range of molecular diagnostic sample-to-answer tests with compact, easy-to-use workstations and self-contained, disposable test cartridges.

20. GenMark’s ePlex: The True Sample-to-Answer Solution™ is designed to optimize laboratory efficiency and address a broad range of infectious disease testing needs, including respiratory, bloodstream and gastrointestinal infections.

21. On March 12, 2021, GenMark’s Board caused the Company to enter into the Merger Agreement with Roche.

22. Pursuant to the terms of the Merger, Merger Sub commenced the Tender Offer to acquire all of GenMark’s outstanding common stock for \$24.05 in cash per share.

23. According to the press release announcing the Proposed Transaction:

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. . . .

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.

Citi is acting as financial advisor to Roche and Sidley Austin LLP is acting as legal counsel to Roche. J.P. Morgan Securities LLC is acting as exclusive financial advisor to GenMark and DLA Piper LLP is acting as legal counsel to GenMark.

***The Solicitation Statement Omits Material Information, Rendering It False and Misleading***

24. Defendants filed the Solicitation Statement with the SEC in connection with the Proposed Transaction.

25. As set forth below, the Solicitation Statement omits material information with respect to the Proposed Transaction, which renders the Solicitation Statement false and misleading.

26. First, the Solicitation Statement omits material information regarding the Company's financial projections.

27. The Solicitation Statement fails to disclose: (i) all line items used to calculate EBITDA; (ii) unlevered free cash flows and all underlying line items; and (iii) a reconciliation of all non-GAAP to GAAP metrics.

28. The disclosure of projected financial information is material because it provides stockholders with a basis to project the future financial performance of a company, and allows stockholders to better understand the financial analyses performed by the company's financial advisor in support of its fairness opinion.

29. Second, the Solicitation Statement omits material information regarding the analyses performed by the Company's financial advisor in connection with the Proposed Transaction, J.P. Morgan Securities LLC ("J.P. Morgan").

30. With respect to J.P. Morgan's Public Trading Multiples analysis, the Solicitation Statement fails to disclose the individual multiples and metrics for the companies observed in the analysis.

31. With respect to J.P. Morgan's Selected Transaction Analysis, the Solicitation Statement fails to disclose the individual multiples and metrics for the transactions observed in the analysis.

32. With respect to J.P. Morgan's Discounted Cash Flow Analysis, the Solicitation Statement fails to disclose: (i) the unlevered free cash flows used in the analysis and all underlying line items; (ii) the Company's terminal values; (iii) the individual inputs and assumptions underlying the discount rates and perpetuity growth rates used in the analysis; (iv) the number of fully diluted Company outstanding shares; and (v) the Company's net cash.

33. When a banker's endorsement of the fairness of a transaction is touted to shareholders, the valuation methods used to arrive at that opinion as well as the key inputs and range of ultimate values generated by those analyses must also be fairly disclosed.

34. Third, the Solicitation Statement fails to disclose whether the Company entered into any nondisclosure agreements that contained standstill and/or "don't ask, don't waive" provisions.

35. The omission of the above-referenced material information renders the Solicitation Statement false and misleading.

36. The above-referenced omitted information, if disclosed, would significantly alter the total mix of information available to the Company's stockholders.

### **COUNT I**

#### **(Claim for Violation of Section 14(e) of the 1934 Act Against Defendants)**

37. Plaintiff repeats and realleges the preceding allegations as if fully set forth herein.

38. Section 14(e) of the 1934 Act states, in relevant part, that:

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading . . . in connection with any tender offer or request or invitation for tenders[.]

39. Defendants disseminated the misleading Solicitation Statement, which contained statements that, in violation of Section 14(e) of the 1934 Act, in light of the circumstances under which they were made, omitted to state material facts necessary to make the statements therein not misleading.

40. The Solicitation Statement was prepared, reviewed, and/or disseminated by defendants.

41. The Solicitation Statement misrepresented and/or omitted material facts in connection with the Proposed Transaction as set forth above.

42. By virtue of their positions within the Company and/or roles in the process and the preparation of the Solicitation Statement, defendants were aware of this information and their duty to disclose this information in the Solicitation Statement.

43. The omissions in the Solicitation Statement are material in that a reasonable shareholder will consider them important in deciding whether to tender their shares in connection with the Proposed Transaction. In addition, a reasonable investor will view a full and accurate disclosure as significantly altering the total mix of information made available.

44. Defendants knowingly or with deliberate recklessness omitted the material information identified above in the Solicitation Statement, causing statements therein to be materially incomplete and misleading.

45. By reason of the foregoing, defendants violated Section 14(e) of the 1934 Act.

46. Because of the false and misleading statements in the Solicitation Statement, plaintiff is threatened with irreparable harm.

47. Plaintiff has no adequate remedy at law.

**COUNT II**

**(Claim for Violation of 14(d) of the 1934 Act Against Defendants)**

48. Plaintiff repeats and realleges the preceding allegations as if fully set forth herein.

49. Section 14(d)(4) of the 1934 Act states:

Any solicitation or recommendation to the holders of such a security to accept or reject a tender offer or request or invitation for tenders shall be made in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

50. Rule 14d-9(d) states, in relevant part:

Any solicitation or recommendation to holders of a class of securities referred to in section 14(d)(1) of the Act with respect to a tender offer for such securities shall include the name of the person making such solicitation or recommendation and the information required by Items 1 through 8 of Schedule 14D-9 (§ 240.14d-101) or a fair and adequate summary thereof[.]

Item 8 requires that directors must “furnish such additional information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not materially misleading.”

51. The Solicitation Statement violates Section 14(d)(4) and Rule 14d-9 because it omits the material facts set forth above, which renders the Solicitation Statement false and/or misleading.

52. Defendants knowingly or with deliberate recklessness omitted the material information set forth above, causing statements therein to be materially incomplete and misleading.

53. The omissions in the Solicitation Statement are material to plaintiff, and he will be deprived of his entitlement to make a fully informed decision with respect to the Proposed Transaction if such misrepresentations and omissions are not corrected prior to the expiration of the Tender Offer.

54. Plaintiff has no adequate remedy at law.

**COUNT III**

**(Claim for Violation of Section 20(a) of the 1934 Act Against the Individual Defendants and Roche)**

55. Plaintiff repeats and realleges the preceding allegations as if fully set forth herein.

56. The Individual Defendants and Roche acted as controlling persons of GenMark within the meaning of Section 20(a) of the 1934 Act as alleged herein. By virtue of their positions as directors of GenMark and participation in and/or awareness of the Company's operations and/or intimate knowledge of the false statements contained in the Solicitation Statement filed with the SEC, they had the power to influence and control and did influence and control, directly or indirectly, the decision making of the Company, including the content and dissemination of the various statements that plaintiff contends are false and misleading.

57. Each of the Individual Defendants and Roche was provided with or had unlimited access to copies of the Solicitation Statement alleged by plaintiff to be misleading prior to and/or shortly after these statements were issued and had the ability to prevent the issuance of the statements or cause them to be corrected.

58. Each of the Individual Defendants had direct and supervisory involvement in the day-to-day operations of the Company, and, therefore, is presumed to have had the power to control and influence the particular transactions giving rise to the violations as alleged herein, and exercised the same. The Solicitation Statement contains the unanimous recommendation of the Individual Defendants to approve the Proposed Transaction. They were thus directly connected with and involved in the making of the Solicitation Statement.

59. Roche also had direct supervisory control over the composition of the Solicitation Statement and the information disclosed therein, as well as the information that was omitted and/or misrepresented in the Solicitation Statement.

60. By virtue of the foregoing, the Individual Defendants and Roche violated Section 20(a) of the 1934 Act.

61. As set forth above, the Individual Defendants and Roche had the ability to exercise control over and did control a person or persons who have each violated Section 14(e) of the 1934 Act and Rule 14a-9, by their acts and omissions as alleged herein. By virtue of their positions as controlling persons, these defendants are liable pursuant to Section 20(a) of the 1934 Act.

62. As a direct and proximate result of defendants' conduct, plaintiff is threatened with irreparable harm.

63. Plaintiff has no adequate remedy at law.

**PRAYER FOR RELIEF**

WHEREFORE, plaintiff prays for judgment and relief as follows:

- A. Enjoining defendants and all persons acting in concert with them from proceeding with, consummating, or closing the Proposed Transaction;
- B. In the event defendants consummate the Proposed Transaction, rescinding it and setting it aside or awarding rescissory damages;
- C. Directing the Individual Defendants to file a Solicitation Statement that does not contain any untrue statements of material fact and that states all material facts required in it or necessary to make the statements contained therein not misleading;
- D. Declaring that defendants violated Sections 14(e), 14(d), and 20(a) of the 1934 Act, as well as Rule 14a-9 promulgated thereunder;
- E. Awarding plaintiff the costs of this action, including reasonable allowance for plaintiff's attorneys' and experts' fees; and
- F. Granting such other and further relief as this Court may deem just and proper.

**JURY DEMAND**

Plaintiff hereby demands a trial by jury.

Dated: March 29, 2021

**RIGRODSKY LAW, P.A.**

By: */s/ Gina M. Serra*

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Seth D. Rigrotsky (#3147)  
Gina M. Serra (#5387)  
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UNITED STATES DISTRICT COURT  
DISTRICT OF DELAWARE

SHIVA STEIN,

Plaintiff,

v.

GENMARK DIAGNOSTICS, INC., KEVIN C. O'BOYLE, DARYL J.  
FAULKNER, JAMES FOX, LISA GILES, and MICHAEL KAGNOFF,

Defendants.

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:  
: Case No. \_\_\_\_\_  
:  
: **COMPLAINT FOR VIOLATIONS OF SECTIONS 14(e), 14(d)**  
: **AND 20(a) OF THE SECURITIES EXCHANGE ACT OF 1934**  
: **JURY TRIAL DEMANDED**  
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Shiva Stein ("Plaintiff"), by and through her attorneys, alleges the following upon information and belief, including investigation of counsel and review of publicly-available information, except as to those allegations pertaining to Plaintiff, which are alleged upon personal knowledge:

1. This is an action brought by Plaintiff against GenMark Diagnostics, Inc. ("GenMark or the "Company") and the members of GenMark's board of directors (the "Board" or the "Individual Defendants" and collectively with the Company, the "Defendants") for their violations of Sections 14(e), 14(d), and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act"), in connection with the proposed acquisition of GenMark by affiliates of Roche Holdings, Inc. ("Roche").

2. Defendants have violated the above-referenced sections of the Exchange Act by causing a materially incomplete and misleading Solicitation Statement on Schedule 14D-9 (the "Solicitation Statement") to be filed on March 25, 2021 with the United States Securities and Exchange Commission ("SEC") and disseminated to Company stockholders. The Solicitation

Statement recommends that Company stockholders tender their shares in support of a proposed transaction whereby Geronimo Acquisition Corp., a wholly owned subsidiary of Roche, will merge with GenMark, with GenMark continuing as the surviving corporation and a wholly owned subsidiary of Roche (the "Proposed Transaction"). Pursuant to the terms of the definitive agreement and plan of merger the companies entered into, dated March 12, 2021 (the "Merger Agreement"), each GenMark common share issued and outstanding will be converted into the right to receive \$24.05 per share in cash (the "Merger Consideration"). In accordance with the Merger Agreement, Merger Sub commenced a tender offer to acquire all of GenMark's outstanding common stock and will expire on April 21, 2021 (the "Tender Offer")

3. Defendants have now asked GenMark's stockholders to support the Proposed Transaction based upon the materially incomplete and misleading representations and information contained in the Solicitation Statement, in violation of Sections 14(e), 14(d), and 20(a) of the Exchange Act. Specifically, the Solicitation Statement contains materially incomplete and misleading information concerning, among other things, (i) GenMark's financial projections relied upon by the Company's financial advisor, J.P. Morgan Securities LLC ("J.P. Morgan"), in its financial analyses; and (ii) the data and inputs underlying the financial valuation analyses that support the fairness opinion. The failure to adequately disclose such material information constitutes a violation of Sections 14(e), 14(d), and 20(a) of the Exchange Act as GenMark stockholders need such information in order to tender their shares in support of the Proposed Transaction.

4. It is imperative that the material information that has been omitted from the Solicitation Statement is disclosed to the Company's stockholders prior to the expiration of the Tender Offer.

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 GenMark'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 subject matter jurisdiction pursuant to Section 27 of the Exchange Act (15 U.S.C. § 78aa) and 28 U.S.C. § 1331 (federal question jurisdiction) as Plaintiff alleges violations of Sections 14(e), 14(d), and 20(a) of the Exchange Act and SEC Rule 14a-9.

7. Personal jurisdiction exists over each Defendant either because each is an individual who is either present in this District for jurisdictional purposes or has sufficient minimum contacts with this District as to render the exercise of jurisdiction over defendant by this Court permissible under traditional notions of fair play and substantial justice.

8. Venue is proper in this District under Section 27 of the Exchange Act, 15 U.S.C. § 78aa, as well as under 28 U.S.C. § 1391, because Defendant GenMark is incorporated in this District.

#### **PARTIES**

9. Plaintiff is, and has been at all relevant times, the owner of GenMark common stock and has held such stock since prior to the wrongs complained of herein.

10. Individual Defendant Kevin C. O'Boyle has served as a member of the Board since March 2010 and as Chairman since February 2020.

11. Individual Defendant Daryl J. Faulkner has served as a member of the Board since March 2010.

12. Individual Defendant James Fox has served as a member of the Board since September 2010.
13. Individual Defendant Lisa Giles has served as a member of the Board since March 2015.
14. Individual Defendant Michael Kagnoff has served as a member of the Board since September 2019.
15. Defendant GenMark is incorporated in Delaware and maintains its principal offices at 5964 La Place Court, Carlsbad, California 92008. The Company's common stock trades on the NASDAQ Exchange under the symbol "GNMK."
16. The defendants identified in paragraphs 10-14 are collectively referred to as the "Individual Defendants" or the "Board."
17. The defendants identified in paragraphs 10-15 are collectively referred to as the "Defendants."

## **SUBSTANTIVE ALLEGATIONS**

### **A. The Proposed Transaction**

18. GenMark, a molecular diagnostics company, engages in the developing and commercializing molecular panels based on its proprietary eSensor electrochemical detection technology. It provides ePlex instrument and respiratory pathogen panel, which integrates automated nucleic acid extraction and amplification with its eSensor technology to enable operators using ePlex system to place patient sample directly into its test cartridge and obtain results. The Company also offers Blood Culture Identification Gram-Positive and Negative panel, Blood Culture Identification Fungal Pathogen panel, and ePlex Gastrointestinal Pathogen Panel. In addition, it provides XT-8 instrument, and related diagnostic and research tests, as well as certain custom manufactured reagents to support a range of molecular tests with a workstation and

disposable test cartridges. Further, the Company offers diagnostic tests for use with its XT-8 system that includes respiratory viral panel, cystic fibrosis genotyping test, warfarin sensitivity test, thrombophilia risk test, and hepatitis C virus genotyping test and associated custom manufactured reagents, as well as 2C19 genotyping test and eSensor SARS-CoV-2 Test. GenMark sells its products through direct sales and technically specialized service organization in the United States, Europe, and internationally. The Company was incorporated in 2010 and is headquartered in Carlsbad, California.

19. On March 12, 2021, the Company announced the Proposed Transaction:

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.

Citi is acting as financial advisor to Roche and Sidley Austin LLP is acting as legal counsel to Roche. J.P. Morgan Securities LLC is acting as exclusive financial advisor to GenMark and DLA Piper LLP is acting as legal counsel to GenMark.

\* \* \*

20. It is therefore imperative that GenMark's stockholders are provided with the material information that has been omitted from the Solicitation Statement, so that they can meaningfully assess whether or not the Proposed Transaction is in their best interests.

**B. The Materially Incomplete and Misleading Solicitation Statement**

21. On March 25, 2021, GenMark filed the Solicitation Statement with the SEC in connection with the Proposed Transaction. The Solicitation Statement was furnished to the Company's stockholders and solicits the stockholders to tender their shares in support of the Proposed Transaction. The Individual Defendants were obligated to carefully review the Solicitation Statement before it was filed with the SEC and disseminated to the Company's stockholders to ensure that it did not contain any material misrepresentations or omissions. However, the Solicitation Statement misrepresents and/or omits material information that is necessary for the Company's stockholders to make an informed decision concerning whether to tender their shares, in violation of Sections 14(e), 14(d), and 20(a) of the Exchange Act.

22. The Solicitation Statement omits material information regarding the Company's financial projections and the valuation analyses performed by J.P. Morgan, the disclosure of which is material because it provides stockholders with a basis to project the future financial performance of the target company, and allows stockholders to better understand the analyses performed by the financial advisor in support of its fairness opinion of the transaction.

*Omissions and/or Material Misrepresentations Concerning GenMark Financial Projections*

23. The Solicitation Statement fails to provide material information concerning financial projections by GenMark management and relied upon by the financial advisor in its analyses. The Solicitation Statement discloses management-prepared financial projections for the Company which are materially misleading. The Solicitation Statement indicates that in connection with the rendering of its fairness opinion, the Company prepared certain non-public financial forecasts (the "Projections") and provided them to the Board and the financial advisor with forming a view about the stand-alone valuation of the Company. Accordingly, the Solicitation Statement should have, but fails to provide, certain information in the projections that GenMark

management provided to the Board and the financial advisor. Courts have uniformly stated that “projections ... are probably among the most highly-prized disclosures by investors. Investors can come up with their own estimates of discount rates or [] market multiples. What they cannot hope to do is replicate management’s inside view of the company’s prospects.” *In re Netsmart Techs., Inc. S’holders Litig.*, 924 A.2d 171, 201-203 (Del. Ch. 2007).

24. For the Projections prepared by Company management for GenMark for fiscal years 2021 through 2030, the Solicitation Statement provides values for non-GAAP (Generally Accepted Accounting Principles) financial metric EBITDA, but fails to disclose: (i) the line items used to calculate the non-GAAP measure or (ii) a reconciliation of the non-GAAP metric to its most comparable GAAP measure, in direct violation of Regulation G.

25. When a company discloses non-GAAP financial measures in a solicitation statement that were relied on by a board of directors to recommend that stockholders exercise their corporate suffrage rights in a particular manner, the company must, pursuant to SEC regulatory mandates, also disclose all projections and information necessary to make the non-GAAP measures not misleading, and must provide a reconciliation (by schedule or other clearly understandable method) of the differences between the non-GAAP financial measure disclosed or released with the most comparable financial measure or measures calculated and presented in accordance with GAAP. 17 C.F.R. § 244.100.

26. The SEC has noted that:

companies should be aware that this measure does not have a uniform definition and its title does not describe how it is calculated. Accordingly, a clear description of how this measure is calculated, as well as the necessary reconciliation, should accompany the measure where it is used. Companies should also avoid inappropriate or potentially misleading inferences about its usefulness. For example, “free cash flow” should not be used in a manner that inappropriately implies that the measure represents the residual cash flow available for discretionary expenditures, since many companies have mandatory debt service requirements or other non-discretionary expenditures that are not deducted from the measure.<sup>1</sup>

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<sup>1</sup> U.S. Securities and Exchange Commission, Non-GAAP Financial Measures, last updated April 4, 2018, available at: <https://www.sec.gov/divisions/corpfin/guidance/nongAAPinterp.htm>.

27. Thus, to cure the Solicitation Statement and the materially misleading nature of the forecasts under SEC Rule 14a-9 as a result of the omitted information in the Solicitation Statement, Defendants must provide a reconciliation table of the non-GAAP measures to the most comparable GAAP measures to make the non-GAAP metrics included in the Solicitation Statement not misleading.

28. Further, the Solicitation Statement fails to disclose Unlevered Free Cash Flows the Company is expected to generate during calendar years 2021 through 2030, which were used by J.P. Morgan in its Discounted Cash Flow Analysis.

Omissions and/or Material Misrepresentations Concerning Financial Analyses

29. With respect to J.P. Morgan's *Public Trading Multiples Analysis*, the Solicitation Statement fails to disclose: (i) the individual metrics and multiples for the companies observed by J.P. Morgan in the analysis; and (ii) J.P. Morgan's basis for selecting a reference range of FV/2022E Revenue Multiples of 2.3x to 6.0x.

30. With respect to J.P. Morgan's *Selected Transaction Analysis*, the Solicitation Statement fails to disclose: (i) the individual metrics and multiples for the transactions observed by J.P. Morgan in the analysis; and (ii) J.P. Morgan's basis for selecting a reference range of FV/LTM Revenue of 3.7x to 9.4x.

31. With respect to J.P. Morgan' *Discounted Cash Flow Analysis*, the Solicitation Statement fails to disclose: (i) the Company's unlevered free cash flows; (ii) the Company's range of terminal values at the end of 2030; (iii) the basis for applying the range of discount rates from 10.0% to 12.0%; (iv) the basis for applying a range of perpetual growth rates of 2.5% to 3.5%; (v) the Company's weighted average cost of capital; (vi) the number of fully diluted outstanding shares of the Company; and (vii) the Company's net cash as of December 31, 2020.

32. In sum, the omission of the above-referenced information renders statements in the Solicitation Statement materially incomplete and misleading in contravention of the Exchange Act. Absent disclosure of the foregoing material information prior to the expiration of the Tender Offer, Plaintiff will be unable to make a fully-informed decision regarding whether to tender her shares, and she is thus threatened with irreparable harm, warranting the injunctive relief sought herein.

## **CLAIMS FOR RELIEF**

### **COUNT I**

#### **On Behalf of Plaintiff Against All Defendants for Violations of Section 14(e) of the Exchange Act**

33. Plaintiff incorporates each and every allegation set forth above as if fully set forth herein.

34. Section 14(e) of the Exchange Act provides that it is unlawful "for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading . . ." 15 U.S.C. § 78n(e).

35. Defendants violated Section 14(e) of the Exchange Act by issuing the Solicitation Statement in which they made untrue statements of material facts or failed to state all material facts necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, in conjunction with the Tender Offer. Defendants knew or recklessly disregarded that the Solicitation Statement 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.

36. The Solicitation Statement was prepared, reviewed and/or disseminated by Defendants. It misrepresented and/or omitted material facts, including material information about the consideration offered to stockholders via the Tender Offer, the intrinsic value of the Company, the Company's financial projections, and the financial advisors' valuation analyses and resultant fairness opinion.

37. In so doing, Defendants made untrue statements of material fact and omitted material information necessary to make the statements that were made not misleading in violation of Section 14(e) of the Exchange Act. By virtue of their positions within the Company and/or roles in the process and in the preparation of the Solicitation Statement, Defendants were aware of this information and their obligation to disclose this information in the Solicitation Statement.

38. The omissions and misleading statements in the Solicitation Statement are material in that a reasonable stockholder would consider them important in deciding whether to tender their shares or seek other remedies. In addition, a reasonable investor would view the information identified above which has been omitted from the Solicitation Statement as altering the "total mix" of information made available to stockholders.

39. Defendants knowingly, or with deliberate recklessness, omitted the material information identified above from the Solicitation Statement, causing certain statements therein to be materially incomplete and therefore misleading. Indeed, while Defendants undoubtedly had access to and/or reviewed the omitted material information in connection with approving the Tender Offer, they allowed it to be omitted from the Solicitation Statement, rendering certain portions of the Solicitation Statement materially incomplete and therefore misleading.

40. The misrepresentations and omissions in the Solicitation Statement are material to Plaintiff, and Plaintiff will be deprived of her entitlement to make a fully informed decision if such misrepresentations and omissions are not corrected prior to the expiration of the Tender Offer.

**COUNT II**  
**Violations of Section 14(d)(4) of the Exchange Act and  
Rule 14d-9 Promulgated Thereunder  
(Against All Defendants)**

41. Plaintiff repeats and re-alleges each allegation set forth above as if fully set forth herein.

42. Defendants have caused the Solicitation Statement to be issued with the intention of soliciting stockholder support of the Tender Offer.

43. Section 14(d)(4) of the Exchange Act and SEC Rule 14d-9 promulgated thereunder require full and complete disclosure in connection with tender offers.

44. The Solicitation Statement violates Section 14(d)(4) and Rule 14d-9 because it omits material facts, including those set forth above, which render the Solicitation Statement false and/or misleading.

45. Defendants knowingly, or with deliberate recklessness, omitted the material information identified above from the Solicitation Statement, causing certain statements therein to be materially incomplete and therefore misleading. Indeed, while Defendants undoubtedly had access to and/or reviewed the omitted material information in connection with approving the Tender Offer, they allowed it to be omitted from the Solicitation Statement, rendering certain portions of the Solicitation Statement materially incomplete and therefore misleading.

46. The misrepresentations and omissions in the Solicitation Statement are material to Plaintiff and Plaintiff will be deprived of her entitlement to make a fully informed decision if such misrepresentations and omissions are not corrected prior to the expiration of the Tender Offer.

**COUNT III**

**On Behalf of Plaintiff Against the Individual Defendants for Violations of Section 20(a) of the Exchange Act**

47. Plaintiff incorporates each and every allegation set forth above as if fully set forth herein.

48. The Individual Defendants acted as controlling persons of GenMark within the meaning of Section 20(a) of the Exchange Act as alleged herein. By virtue of their positions as directors of GenMark, and participation in and/or awareness of the Company's operations and/or intimate knowledge of the incomplete and misleading statements contained in the Solicitation Statement filed with the SEC, they had the power to influence and control and did influence and control, directly or indirectly, the decision making of GenMark, including the content and dissemination of the various statements that Plaintiff contends are materially incomplete and misleading.

49. Each of the Individual Defendants was provided with or had unlimited access to copies of the Solicitation Statement and other statements alleged by Plaintiff to be misleading prior to and/or shortly after these statements were issued and had the ability to prevent the issuance of the statements or cause the statements to be corrected.

50. In particular, each of the Individual Defendants had direct and supervisory involvement in the day-to-day operations of GenMark, and, therefore, is presumed to have had the power to control or influence the particular transactions giving rise to the Exchange Act violations alleged herein, and exercised the same. The omitted information identified above was reviewed by the Board prior to voting on the Proposed Transaction. The Solicitation Statement at issue contains the unanimous recommendation of the Board to approve the Proposed Transaction. The Individual Defendants were thus directly involved in the making of the Solicitation Statement.

51. In addition, as the Solicitation Statement sets forth at length, and as described herein, the Individual Defendants were involved in negotiating, reviewing, and approving the Merger Agreement. The Solicitation Statement purports to describe the various issues and information that the Individual Defendants reviewed and considered. The Individual Defendants participated in drafting and/or gave their input on the content of those descriptions.

52. By virtue of the foregoing, the Individual Defendants have violated Section 20(a) of the Exchange Act.

53. As set forth above, the Individual Defendants had the ability to exercise control over and did control a person or persons who have each violated Section 14(d) and (e), by their acts and omissions as alleged herein. By virtue of their positions as controlling persons, these defendants are liable pursuant to Section 20(a) of the Exchange Act. As a direct and proximate result of Individual Defendants' conduct, Plaintiff will be irreparably harmed.

54. Plaintiff has no adequate remedy at law. Only through the exercise of this Court's equitable powers can Plaintiff be fully protected from the immediate and irreparable injury that Defendants' actions threaten to inflict.

#### **RELIEF REQUESTED**

WHEREFORE, Plaintiff demands injunctive relief in her favor and against the Defendants jointly and severally, as follows:

A. Preliminarily and permanently enjoining Defendants and their counsel, agents, employees and all persons acting under, in concert with, or for them, from proceeding with, consummating, or closing the Proposed Transaction, unless and until Defendants disclose the material information identified above which has been omitted from the Solicitation Statement;

B. Rescinding, to the extent already implemented, the Merger Agreement or any of the terms thereof, or granting Plaintiff rescissory damages;

- C. Directing the Defendants to account to Plaintiff for all damages suffered as a result of their wrongdoing;
- D. Awarding Plaintiff the costs and disbursements of this action, including reasonable attorneys' and expert fees and expenses; and
- E. Granting such other and further equitable relief as this Court may deem just and proper.

**JURY DEMAND**

Plaintiff demands a trial by jury.

Dated: March 26, 2021

**RIGRODSKY LAW, P.A.**

By: /s/ Gina M. Serra

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

DENNIS EVANGELISTA,

Plaintiff,

vs.

GENMARK DIAGNOSTICS, INC., KEVIN C. O'BOYLE, DARYL J. FAULKNER, JAMES FOX, LISA GILES, and MICHAEL KAGNOFF,

Defendants.

Case No.: '21CV0567 BEN JLB

**Complaint For:**

- (1) Violation of § 14(e) of the Securities Exchange Act of 1934
- (2) Violation of § 14(d) of the Securities Exchange Act of 1934
- (3) Violation of § 20(a) of the Securities Exchange Act of 1934

**JURY TRIAL DEMANDED**

Plaintiff, Dennis Evangelista ("Plaintiff"), by and through his attorneys, alleges upon information and belief, except for those allegations that pertain to him, which are alleged upon personal knowledge, as follows:

**SUMMARY OF THE ACTION**

1. Plaintiff brings this action against GenMark Diagnostics, Inc. ("GenMark" or the "Company"), and the Company's Board of Directors (the "Board" or the "Individual Defendants," collectively with GenMark and the Individual Defendants, the "Defendants"), for violations of Sections 14(e), 14(d), and 20(a) of the Securities and Exchange Act of 1934 (the "Exchange Act") as a result of Defendants' efforts to sell the Company to Roche Holdings Inc. ("Parent"), and Geronimo Acquisition Corp. ("Merger Sub," and together with Parent, "Roche") as a result of an

unfair process resulting in insufficient and/or misleading information being provided to Plaintiff in his capacity as a GenMark public stockholder, and to require Defendants to produce such information prior to the consummation of an upcoming tender offer on a proposed all-cash transaction valued at approximately \$1.8 billion (the "Proposed Transaction").

2. The terms of the Proposed Transaction were memorialized in a March 15, 2021, filing with the Securities and Exchange Commission ("SEC") on Form 8-K attaching the definitive Agreement and Plan of Merger (the "Merger Agreement"). Under the terms of the Merger Agreement, GenMark will become an indirect, wholly-owned subsidiary of Roche, and GenMark stockholders will receive \$24.05 in cash for each share of GenMark common stock they own. As a result of the Proposed Transaction, Plaintiff as a GenMark stockholder will be frozen out of any interest in the surviving entity.

3. Thereafter, on March 25, 2021, GenMark filed a Solicitation/Recommendation Statement on Schedule 14D-9 (the "Recommendation Statement") with the SEC in support of the Proposed Transaction.

4. In violation of the Exchange Act, Defendants caused to be filed the materially deficient Recommendation Statement in an effort to solicit stockholders, including Plaintiff, to tender their GenMark shares in favor of the Proposed Transaction. The Recommendation Statement is materially deficient, deprives Plaintiff of the information necessary to make an intelligent, informed and rational decision of whether to tender in favor of the Proposed Transaction, and is thus in violation of the Exchange Act. As detailed below, the Recommendation Statement omits and/or misrepresents material information concerning, among other things: (a) the sales process and in particular certain conflicts of interest for management; (b) the financial projections for GenMark, provided by GenMark to the Company's financial advisor J.P. Morgan Securities LLC ("J.P. Morgan"); and (c) the data and inputs underlying the financial valuation analyses, if any, that purport to support the fairness opinions created by J.P. Morgan and provides to the Company and the Board.

5. Accordingly, this action seeks to compel the Individual Defendants to properly comply with the Exchange Act and disseminate all required information prior to the consummation of the Proposed Transaction.

6. Absent judicial intervention, the Proposed Transaction will be consummated, resulting in irreparable injury to Plaintiff.

### **PARTIES**

7. Plaintiff is a citizen of California and, at all times relevant hereto, has been a GenMark stockholder.

8. Defendant GenMark is a molecular diagnostics company, engages in the developing and commercializing molecular panels based on its proprietary eSensor electrochemical detection technology. GenMark is incorporated under the laws of the State of Delaware and has its principal place of business at 5964 La Place Court, Carlsbad, CA 92008. Shares of GenMark common stock are traded on the NasdaqGM under the symbol "GNMK".

9. Defendant Kevin C. Boyle ("Boyle") has been a Director of the Company at all relevant times. In addition, Boyle serves as the Company's Chairman of the Board.

10. Defendant Daryl J. Faulkner ("Faulkner") has been a director of the Company at all relevant times.

11. Defendant Fames Fox ("Fox") has been a director of the Company at all relevant times.

12. Defendant Peder K. Jensen ("Jensen") has been a director of the Company at all relevant times.

13. Defendant Lisa Giles ("Giles") has been a director of the Company at all relevant times.

14. Defendant Michael Kagnoff ("Kagnoff") has been a director of the Company at all relevant times.

15. Defendants identified in ¶¶ 9 - 14 are collectively referred to as the "Individual Defendants."

16. Non-Defendant Parent is a subsidiary of F. Hoffmann-LaRoche AG.
17. Non-Defendant Merger Sub is a wholly owned subsidiary of Parent created to effectuate the Proposed Transaction.
18. Non-Defendant F. Hoffman-LaRoche AG is the ultimate parent of Roche and is a Swiss multinational healthcare company that operates worldwide.

### **JURISDICTION AND VENUE**

19. This Court has subject matter jurisdiction pursuant to Section 27 of the Exchange Act (15 U.S.C. § 78aa) and 28 U.S.C. § 1331 (federal question jurisdiction) as Plaintiff alleges violations of Sections 14(e), 14(d), and Section 20(a) of the Exchange Act. This action is not a collusive one to confer jurisdiction on a court of the United States, which it would not otherwise have. The Court has supplemental jurisdiction over any claims arising under state law pursuant to 28 U.S.C. § 1367.

20. Personal jurisdiction exists over each defendant either because the defendant conducts business in or maintains operations in this District, or is an individual who is either present in this District for jurisdictional purposes or has sufficient minimum contacts with this District as to render the exercise of jurisdiction over defendant by this Court permissible under traditional notions of fair play and substantial justice.

21. Venue is proper in this District pursuant to 28 U.S.C. § 1391, because GenMark maintains its principal offices in this district, and each of the Individual Defendants, as Company officers or directors, has extensive contacts within this District.

### **SUBSTANTIVE ALLEGATIONS**

#### ***Company Background***

22. GenMark is a molecular diagnostics company, engages in the developing and commercializing molecular panels based on its proprietary eSensor electrochemical detection technology.

23. The Company's provides ePlex instrument and respiratory pathogen panel, which integrates automated nucleic acid extraction and amplification with its eSensor technology to enable operators using ePlex system to place patient sample directly into its test cartridge and obtain results.

24. GenMark also offers Blood Culture Identification Gram-Positive and Negative panel, Blood Culture Identification Fungal Pathogen panel, and ePlex Gastrointestinal Pathogen Panel. In addition, it provides XT-8 instrument, and related diagnostic and research tests, as well as certain custom manufactured reagents to support a range of molecular tests with a workstation and disposable test cartridges.

25. The Company also offers diagnostic tests for use with its XT-8 system that includes respiratory viral panel, cystic fibrosis genotyping test, warfarin sensitivity test, thrombophilia risk test, and hepatitis C virus genotyping test and associated custom manufactured reagents, as well as 2C19 genotyping test and eSensor SARS-CoV-2 Test.

### ***The Flawed Sales Process***

26. As detailed in the Recommendation Statement, the process deployed by the Individual Defendants was flawed and inadequate, and the Recommendation Statement fails to provide specific details regarding a plethora of important facts.

27. Notably, the Recommendation Statement does not indicate that a committee of independent, outside directors was created to run the sales process.

28. In addition, the Recommendation Statement is silent as to the nature of the various confidentiality agreements entered into between the Company and potentially interested third parties throughout the sales process, including Roche, whether these agreements differ from each other, and if so in what way, including failing to disclose all specific conditions under which any standstill provision contained in any entered confidentiality agreement entered into between the Company and potentially interested third parties throughout the sales process, including Roche, would fall away.

29. Moreover, the Recommendation Statement also fails to adequately disclose communications regarding post-transaction employment during the negotiation of the underlying transaction must be disclosed to stockholders. Communications regarding post-transaction employment during the negotiation of the underlying transaction must be disclosed to Plaintiff as a Company stockholder. This information is necessary to understand potential conflicts of interest of management and the Board, as that information provides illumination concerning motivations that would prevent fiduciaries from acting solely in the best interests of Plaintiff and Company stockholders

30. It is not surprising, given this background to the overall sales process, that it was conducted in a completely inappropriate and misleading manner

### ***The Proposed Transaction***

31. On March 15, 2021, GenMark and Roche issued a joint press release announcing the Proposed Transaction. The press release stated, 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.

Citi is acting as financial advisor to Roche and Sidley Austin LLP is acting as legal counsel to Roche. J.P. Morgan Securities LLC is acting as exclusive financial advisor to GenMark and DLA Piper LLP is acting as legal counsel to GenMark.

#### ***The Materially Misleading and/or Incomplete Recommendation Statement***

32. On March 25, 2021, the GenMark Board caused to be filed with the SEC a materially misleading and incomplete Recommendation Statement that failed to provide Plaintiff in his capacity as a Company stockholder with material information and/or provides materially misleading information critical to the total mix of information concerning the financial and procedural fairness of the Proposed Transaction.

Omissions and/or Material Misrepresentations Concerning the Sales Process Leading Up to the Proposed Transaction

33. Specifically, the Recommendation Statement fails to disclose material information concerning the process conducted by the Company and the events leading up to the Proposed Transaction. In particular, the Recommendation Statement fails to disclose

- a. The specific reasoning no committee of independent outside directors was created to run the sales process;
- b. Whether the terms of any confidentiality agreements entered during the sales process between GenMark on the one hand, and any other third party, including Roche, on the other hand, differed from one another, and if so, in what way;
- c. All specific conditions under which any standstill provision contained in any entered confidentiality agreement entered into between the Company and potentially interested third parties throughout the sales process, including Roche, would fall away;
- d. Communications regarding post-transaction employment during the negotiation of the underlying transaction must be disclosed to stockholders. Communications regarding post-transaction employment during the negotiation of the underlying transaction must be disclosed to stockholders. This information is necessary for stockholders to understand potential conflicts of interest of management and the Board, as that information provides illumination concerning motivations that would prevent fiduciaries from acting solely in the best interests of the Company's stockholders

Omissions and/or Material Misrepresentations Concerning GenMark's Financial Projections

34. The Recommendation Statement fails to provide material information concerning financial projections provided by GenMark management and relied upon by J.P. Morgan in its analyses. The Recommendation Statement discloses management-prepared financial projections for the Company which are materially misleading.

35. The Recommendation Statement indicates that in connection with the rendering of its fairness opinions, J.P. Morgan reviewed "certain internal financial analyses and forecasts prepared by the management of the Company relating to its business."

36. Accordingly, the Recommendation Statement should have, but fails to provide, certain information in the projections that GenMark management provided to the Board and J.P. Morgan. Courts have uniformly stated that "projections ... are probably among the most highly-prized disclosures by investors. Investors can come up with their own estimates of discount rates or [ ] market multiples. What they cannot hope to do is replicate management's inside view of the company's prospects." *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 201-203 (Del. Ch. 2007).

37. With respect to the "Management Projections (Risk-Adjusted)," the Recommendation Statement fails to disclose material information concerning the financial projections prepared by GenMark management.

38. Specifically, the Recommendation Statement fails to disclose all material line items for the metrics of:

- a. EBITDA, including the underlying metrics of interest, taxes, depreciation and amortization.

39. The Recommendation Statement also provides non-GAAP financial metrics, but fails to disclose a reconciliation of all non-GAAP to GAAP metrics.

40. Moreover, the Recommendation Statement fails to disclose the following:

- a. The unadjusted Management Projections provided to J.P. Morgan;

- b. The specific adjustments made to the “Management Projections;” and
- c. The specific inputs and assumptions used to determine the adjustments made to the Management Projections.

41. This information is necessary to provide Plaintiff in his capacity as a Company stockholder a complete and accurate picture of the sales process and its fairness. Without this information, Plaintiff is not fully informed as to Defendants’ actions, including those that may have been taken in bad faith, and cannot fairly assess the process.

42. Without accurate projection data presented in the Recommendation Statement, Plaintiff is unable to properly evaluate the accuracy of J.P. Morgan’s financial analyses, or make an informed decision whether to tender their Company stock in favor of the Proposed Transaction.

Omissions and/or Material Misrepresentations Concerning the Financial Analyses by J.P. Morgan

43. In the Recommendation Statement, J.P. Morgan describes its fairness opinion and the various valuation analyses performed to render such opinion. However, the descriptions fail to include necessary underlying data, support for conclusions, or the existence of, or basis for, underlying assumptions. Without this information, one cannot replicate the analyses, confirm the valuations or evaluate the fairness opinions.

44. With respect to the *Public Trading Multiples* Analysis, the Recommendation Statement fails to disclose:

- a. The specific metrics for each compared company; and
- b. The specific inputs and assumptions used for selecting the FV/2022E Revenue Multiple reference range for the Company of 2.3x to 6.0x.

45. With respect to the *Selected Transaction Analysis*, the Recommendation Statement fails to disclose:

- a. The specific metrics for each selected transaction;
- b. The date on which each selected transaction closed;

- c. The aggregate value of each selected transaction; and
- d. The specific inputs and assumptions used for selecting the FV/LTM Revenue Multiple reference range for the Company of 3.7x to 9.4.

46. With respect to the *Discounted Cash Flow Analysis*, the Recommendation Statement fails to disclose:

- a. The unlevered free cash flow that the Company is expected to generate during calendar years 2021 through 2030 ;
- b. The Company's range of terminal values calculated;
- c. The specific inputs and assumptions used to calculate the utilized range of perpetuity growth rates of 2.5% to 3.5%;
- d. The specific inputs and assumptions used to calculate the utilized discount rate range of 10.0% to 12.0%;
- e. The Company's weighted average cost of capital;
- f. The Company's net cash as of December 31, 2020; and
- g. The Company's number of fully diluted shares outstanding.

47. These disclosures are critical for Plaintiff to be able to make an informed decision on whether to tender his shares in favor of the Proposed Transaction.

48. Without the omitted information identified above, Plaintiff is missing critical information necessary to evaluate whether the proposed consideration truly maximizes his value and serves his interest as a public GenMark stockholder. Moreover, without the key financial information and related disclosures, Plaintiff cannot gauge the reliability of the fairness opinion and the Board's determination that the Proposed Transaction is in his best interests as a public GenMark stockholder. As such, the Board has breached their fiduciary duties by failing to include such information in the Recommendation Statement.

**FIRST COUNT**

**Violations of Section 14(e) of the Exchange Act**

**(Against All Defendants)**

49. Plaintiff repeats all previous allegations as if set forth in full herein.

50. Defendants have disseminated the Recommendation Statement with the intention of soliciting stockholders, including Plaintiff, to tender their shares in favor of the Proposed Transaction.

51. Section 14(e) of the Exchange Act provides that in the solicitation of shares in a tender offer, “[i]t shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading[.].”

52. The Recommendation Statement was prepared in violation of Section 14(e) because it is materially misleading in numerous respects and omits material facts, including those set forth above. Moreover, in the exercise of reasonable care, Defendants knew or should have known that the Recommendation Statement is materially misleading and omits material facts that are necessary to render them non-misleading.

53. The Individual Defendants had actual knowledge or should have known of the misrepresentations and omissions of material facts set forth herein.

54. The Individual Defendants were at least negligent in filing a Recommendation Statement that was materially misleading and/or omitted material facts necessary to make the Recommendation Statement not misleading.

55. The misrepresentations and omissions in the Recommendation Statement are material to Plaintiff, and Plaintiff will be deprived of his entitlement to decide whether to tender its shares on the basis of complete information if such misrepresentations and omissions are not corrected prior to the expiration of the tender offer period regarding the Proposed Transaction.

56. Plaintiff has no adequate remedy at law.

**SECOND COUNT**

**Violations of Section 14(d)(4) of the Exchange Act and SEC Rule 14d-9**

**(Against All Defendants)**

57. Plaintiff repeats and realleges all previous allegations as if set forth in full herein.

58. Defendants have disseminated the Recommendation Statement with the intention of soliciting stockholders, including Plaintiff, to tender their shares in favor of the Proposed Transaction.

59. Section 14(d)(4) requires Defendants to make full and complete disclosure in connection with a tender offer.

60. SEC Rule 14d-9 requires a Company's directors to, furnish such additional information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not materially misleading.

61. Here, the Recommendation Statement violates both Section 14(d)(4) and SEC Rule 14d-9 because it is materially misleading in numerous respects, omits material facts, including those set forth above and Defendants knowingly or recklessly omitted the material facts from the Recommendation Statement.

62. The misrepresentations and omissions in the Recommendation Statement are material to Plaintiff, and Plaintiff will be deprived of his entitlement to decide whether to tender his shares on the basis of complete information if such misrepresentations and omissions are not corrected prior to the expiration of the tender offer period regarding the Proposed Transaction.

63. Plaintiff has no adequate remedy at law

### **THIRD COUNT**

#### **Violations of Section 20(a) of the Exchange Act**

##### **(Against all Individual Defendants)**

64. Plaintiff repeats all previous allegations as if set forth in full herein.

65. The Individual Defendants were privy to non-public information concerning the Company and its business and operations via access to internal corporate documents, conversations and connections with other corporate officers and employees, attendance at management and Board meetings and committees thereof and via reports and other information provided to them in connection therewith. Because of their possession of such information, the Individual Defendants knew or should have known that the Recommendation Statement was materially misleading to Company stockholders.

66. The Individual Defendants were involved in drafting, producing, reviewing and/or disseminating the materially false and misleading statements complained of herein. The Individual Defendants were aware or should have been aware that materially false and misleading statements were being issued by the Company in the Recommendation Statement and nevertheless approved, ratified and/or failed to correct those statements, in violation of federal securities laws. The Individual Defendants were able to, and did, control the contents of the Recommendation Statement. The Individual Defendants were provided with copies of, reviewed and approved, and/or signed the Recommendation Statement before its issuance and had the ability or opportunity to prevent its issuance or to cause it to be corrected.

67. The Individual Defendants also were able to, and did, directly or indirectly, control the conduct of GenMark's business, the information contained in its filings with the SEC, and its public statements. Because of their positions and access to material non-public information available to them but not the public, the Individual Defendants knew or should have known that the misrepresentations specified herein had not been properly disclosed to and were being concealed from the Company's stockholders, including Plaintiff, and that the Recommendation Statement was misleading. As a result, the Individual Defendants are responsible for the accuracy of the Recommendation Statement and are therefore responsible and liable for the misrepresentations contained herein.

68. The Individual Defendants acted as controlling persons of GenMark within the meaning of Section 20(a) of the Exchange Act. By reason of their position with the Company, the Individual Defendants had the power and authority to cause GenMark to engage in the wrongful conduct complained of herein. The Individual Defendants controlled GenMark and all of its employees. As alleged above, GenMark is a primary violator of Section 14 of the Exchange Act and SEC Rule 14a-9. By reason of their conduct, the Individual Defendants are liable pursuant to section 20(a) of the Exchange Act.

WHEREFORE, Plaintiff demands injunctive relief, in his favor, and against the Defendants, as follows:

A. Enjoining the Proposed Transaction;

B. Directing the Individual Defendants to exercise their fiduciary duties to disseminate a Recommendation Statement that does not contain any untrue statements of material fact and that states all material facts required in it or necessary to make the statements contained therein not misleading;

C. Awarding Plaintiff the costs of this action, including reasonable allowance for Plaintiff's attorneys' and experts' fees; and

D. Granting such other and further relief as this Court may deem just and proper.

**DEMAND FOR JURY TRIAL**

Plaintiff hereby demands a jury on all issues which can be heard by a jury.

Dated: March 31, 2021

**BRODSKY SMITH**

By: /s/ Evan J. Smith

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Ryan P. Cardona, Esquire (SBN 302113)

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*Attorneys for Plaintiff*

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

BRYAN ANDERSON,

Plaintiff,

v.

GENMARK DIAGNOSTICS, INC., KEVIN C. O'BOYLE, DARYL J.  
FAULKNER, JAMES FOX, LISA M. GILES, and MICHAEL S.  
KAGNOFF,

Defendants.

:  
:  
: Case No. '21CV0576 BEN MSB  
:  
:  
: **COMPLAINT FOR VIOLATIONS OF THE FEDERAL  
SECURITIES LAWS**  
:  
: JURY TRIAL DEMANDED  
:  
:  
:  
:  
:

Plaintiff Bryan Anderson ("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. This is an action brought by Plaintiff 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(e) and 20(a) of the Securities Exchange Act of 1934 (the “Exchange Act”), 15 U.S.C. §§ 78n(e), 78t(a), and 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”).

2. On March 15, 2021, GenMark and Roche issued a joint press release announcing that they had entered 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 (i.e., one minute after 11:59 p.m., New York City time, on 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”) with the SEC. The Recommendation Statement, which recommends that GenMark stockholders tender their shares in favor of the Proposed Transaction, omits or misrepresents material information concerning, among other things: (i) 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”); (ii) the background leading to the Proposed Transaction; and (iii) 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. In short, the Proposed Transaction will unlawfully divest GenMark's public stockholders of the Company's valuable assets without fully disclosing all material information concerning the Proposed Transaction to Company stockholders. To remedy defendants' Exchange Act violations, Plaintiff seeks to enjoin the expiration of the Tender Offer unless and until such problems are remedied.

#### **JURISDICTION AND VENUE**

5. 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).

6. 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.

7. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because Plaintiff's claims arose in this District, where a substantial portion of the actionable conduct took place, where most of the documents are electronically stored, and where the evidence exists. GenMark is incorporated in Delaware and is headquartered in this District. Moreover, each of the Individual Defendants, as Company officers or directors, either resides in this District or has extensive contacts within this District.

#### **PARTIES**

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

9. Defendant GenMark is a Delaware corporation with its principal executive offices located at 5964 La Place Court, Carlsbad, California 92008. GenMark is a leading provider of 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."

10. 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.

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

12. 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.

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

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

15. Defendants identified in paragraphs 10 to 14 are collectively referred to herein as the "Board" or the "Individual Defendants."

#### **OTHER RELEVANT ENTITIES**

16. Roche is a Delaware corporation and global pioneer in pharmaceuticals and diagnostics focused on advancing science to improve people's lives. Roche is the world's largest biotech company, with differentiated medicines in oncology, immunology, infectious diseases, ophthalmology and diseases of the central nervous system. Roche is also the world leader in in vitro diagnostics and tissue-based cancer diagnostics, and a frontrunner in diabetes management. The Roche Group, headquartered in Basel, Switzerland, is active in over 100 countries. In 2020, Roche invested CHF 12.2 billion in R&D and posted sales of CHF 58.3 billion.

17. Merger Sub is a Delaware corporation and wholly owned subsidiary of Roche.

**Company Background**

18. GenMark is a molecular diagnostics company focused on developing and commercializing multiplex molecular diagnostic solutions designed to enhance patient care, improve key quality metrics, and reduce the total cost-of-care. The Company currently develops and commercializes high-value instruments and simple to perform, clinically relevant multiplex molecular panels based on GenMark's proprietary eSensor electrochemical detection technology. eSensor instruments are designed to support a broad range of molecular diagnostic panels with compact, easy-to-use workstations and self-contained, disposable test cartridges. The Company's ePlex instrument is a multiplex, sample-to-answer platform that is designed to optimize laboratory efficiency and address a broad range of infectious disease testing needs, including respiratory, bloodstream, and gastrointestinal infections. GenMark is currently commercializing its ePlex instrument and its diagnostic test panels ("ePlex system") in the United States, Europe, and certain other geographic regions. GenMark expects to continue to expand sales of its ePlex system internationally.

19. On February 25, 2021, the Company announced its fourth quarter and full year 2020 financial results and business highlights. For the fourth quarter 2020, GenMark reported total revenue of \$50.1 million, an increase of 84% over the fourth quarter of 2019, ePlex revenue of \$45.4 million, an increase of 138% over the fourth quarter of 2019; and gross margin of 39%, compared to 34% in the fourth quarter of 2019. For the full year 2020, GenMark reported total revenue of \$171.6 million, an increase of 95% over 2019; gross margin of 40%, compared to 32% in 2019; and cash and investments were \$128.2 million as of December 31, 2020. Reflecting on the Company's results, Scott Mendel, President and Chief Executive Officer ("CEO") of GenMark commented:

2020 was truly a transformational year for GenMark both financially and operationally. Our growth would not have been possible without the tremendous efforts of our team coming together to respond to a rapidly spreading disease - delivering innovative R&D and strong commercial execution. Our global ePlex installed base grew 50% year-over-year and builds on a strong foundation of enduring and predictable revenue.

Our priorities in 2021 include increased adoption of our BCID and RP panels, as well as driving further market penetration for our differentiated ePlex platform. We are also focused on delivering financial execution, specifically driving revenue growth and improving margins that further accelerate cash flow positivity. Lastly, we plan to increase investment in innovation, including enhancing current panels, completing new panels and investing in longer term advanced technology development.

### **The Proposed Transaction**

20. On March 15, 2021, GenMark and Roche issued a joint press release announcing the Proposed Transaction. The press release states, 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.

### **Insiders’ Interests in the Proposed Transaction**

28. GenMark insiders are the primary beneficiaries of the Proposed Transaction, not the Company’s public stockholders. The Board and the Company’s executive officers are conflicted because they will have secured unique benefits for themselves from the Proposed Transaction not available to Plaintiff and the public stockholders of GenMark.

29. Notably, Company insiders stand to reap substantial financial benefits for securing the deal with Roche. The following table sets forth the cash payments the Company’s executive officers and directors will receive in connection with tendering their shares in the Tender Offer:

	<b>Number of Shares Held(1)</b>	<b>Cash Value of Shares</b>
<b>Executive Officers:</b>		
Scott Mendel	261,994(2)	\$ 6,300,956
Johnny Ek	74,368	1,788,550
Michael Gleeson	292,967(3)	7,045,856
Michael Harkins	50,329	1,210,412
Tyler Jensen	96,138	2,312,119
Scott O’Brien	57,504	1,382,971
Eric Stier	154,565	3,717,288
Abdul Chohan	—	—
Alan Baer Maderazo	148,742	3,577,245
Christine Shaw	30,008	721,692
Hollis Winkler	51,564	1,240,114
<b>Directors:</b>		
Daryl J. Faulkner	113,318	2,725,298
James Fox, Ph.D.	242,681(4)	5,836,478
Kevin C. O’Boyle	103,550	2,490,378
Lisa M. Giles	65,465(5)	1,574,433
Michael S. Kagnoff	118,216	2,843,095
<b>All directors and executive officers as a group:</b>	<b>1,861,409</b>	<b>\$44,766,886</b>

30. Further, upon consummation of the Proposed Transaction, all vested and unvested Company options, restricted stock units (“RSU”), and market-based stock units (“MSU”) will be converted into the right to receive cash payments, as set forth in the following table:

	Vested Stock Options			Unvested Stock Options			Restricted Stock Units		Market-Based Stock Units		Total Equity Award Consideration
	Shares	Weighted Average Exercise Price	Aggregate Stock Option Payment(1)	Shares	Weighted Average Exercise Price	Aggregate Stock Option Payment(1)	Restricted Stock Units	Aggregate RSU Payment(2)	Market-Based Stock Units(3)	Aggregate MSU Payment(2)	
<b>Executive Officers:</b>											
Scott Mendel	119,554	\$ 10.54	\$ 1,614,915	—	n/a	\$ —	360,695	\$ 8,674,715	181,714	\$ 4,370,222	\$ 14,659,852
Johnny Ek	34,000	\$ 12.38	\$ 396,780	—	n/a	\$ —	158,625	\$ 3,814,931	93,334	\$ 2,244,683	\$ 6,456,394
Michael Gleeson	165,600	\$ 12.34	\$ 1,939,608	—	n/a	\$ —	129,845	\$ 3,122,772	67,502	\$ 1,623,423	\$ 6,685,803
Michael Harkins	—	n/a	\$ —	—	n/a	\$ —	93,282	\$ 2,243,432	45,834	\$ 1,102,308	\$ 3,345,740
Tyler Jensen	—	n/a	\$ —	—	n/a	\$ —	116,250	\$ 2,795,813	64,168	\$ 1,543,240	\$ 4,339,053
Scott O'Brien	25,200	\$ 10.76	\$ 334,820	—	n/a	\$ —	113,375	\$ 2,726,669	58,334	\$ 1,402,933	\$ 4,464,422
Eric Stier	147,550	\$ 11.85	\$ 1,799,384	—	n/a	\$ —	121,409	\$ 2,919,886	63,332	\$ 1,523,135	\$ 6,242,405
Hollis Winkler	—	n/a	\$ —	—	n/a	\$ —	95,938	\$ 2,307,309	52,502	\$ 1,262,673	\$ 3,569,982
Alan Baer											
Maderazo	—	n/a	\$ —	—	n/a	\$ —	113,438	\$ 2,728,184	61,666	\$ 1,483,067	\$ 4,211,251
Christine Shaw	—	n/a	\$ —	—	n/a	\$ —	72,188	\$ 1,736,121	17,500	\$ 420,875	\$ 2,156,996
Chohan Abdul	—	n/a	\$ —	—	n/a	\$ —	63,750	\$ 1,533,188	12,500	\$ 300,625	\$ 1,833,813
Hany Massarany(	—	n/a	\$ —	—	n/a	\$ —	—	\$ —	72,500	\$ 3,487,250	\$ 3,487,250
<b>Directors:</b>											
Daryl J. Faulkner	10,741	\$ 4.38	\$ 211,275	—	n/a	\$ —	20,553	\$ 494,300	—	\$ —	\$ 705,575
James Fox, Ph.D.	—	n/a	\$ —	—	n/a	\$ —	20,421	\$ 491,125	—	\$ —	\$ 491,125
Kevin C.											
O'Boyle	13,426	\$ 4.38	\$ 264,089	—	n/a	\$ —	28,128	\$ 676,478	—	\$ —	\$ 940,567
Lisa M. Giles	19,062	\$ 13.17	\$ 207,395	—	n/a	\$ —	21,607	\$ 519,648	—	\$ —	\$ 727,043
Michael S.											
Kagnoff	19,062	\$ 13.17	\$ 207,395	—	n/a	\$ —	19,103	\$ 459,427	—	\$ —	\$ 666,822

31. In addition, if they are terminated in connection with the Proposed Transaction, GenMark's named executive officers will receive substantial cash severance payments in the form of golden parachute compensation as set forth in the following table:

Name(1)	Cash(2)	Equity(3)	Perquisites/Benefits(4)	Other	Total
Scott Mendel	\$ 1,695,021	\$ 14,659,852	\$ 28,868	—	\$ 16,383,741
Johnny Ek	\$ 512,590	\$ 6,456,394	\$ 20,793	—	\$ 6,989,776
Michael Gleeson	\$ 365,215	\$ 6,685,803	\$ 15,860	—	\$ 7,066,878
Scott O'Brien	\$ 376,252	\$ 4,464,422	\$ 21,651	—	\$ 4,862,325
Tyler Jensen	\$ 338,772	\$ 4,339,053	\$ 15,594	—	\$ 4,693,419
Hany Massarany(5)	—	\$ 3,487,250	—	—	\$ 3,487,250

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

32. The defendants filed a materially incomplete and misleading Recommendation Statement with the SEC and disseminated it to GenMark's stockholders. The Recommendation Statement misrepresents or omits material information that is necessary for the Company's stockholders to make an informed decision whether to tender their shares in the Proposed Transaction or seek appraisal.

33. Specifically, as set forth below, the Recommendation Statement fails to provide Company stockholders with material information or provides them with materially misleading information concerning: (i) GenMark's financial projections and the data and inputs underlying the financial valuation analyses that support the fairness opinion provided by J.P. Morgan; (ii) the background leading to the Proposed Transaction and (iii) Company insiders' potential conflicts of interest.

**Material Omissions Concerning GenMark's Financial Projections and J.P. Morgan's Financial Analyses**

34. The Recommendation Statement omits material information regarding the Company's financial projections.

35. For example, the Recommendation Statement discloses "risk-adjusted summary selected unaudited projected financial information for the Company on a standalone basis for calendar years 2021 through 2030 prepared by management. . . ." Recommendation Statement at 26. The Recommendation Statement, however, fails to disclose: (i) the specific risk adjustments Company management made to derive the risk-adjusted projections; (ii) Company management's basis and assumptions underlying the risk adjustments; and (iii) the non-risk-adjusted projections so GenMark stockholders can evaluate the financial impact the Company's risk-adjustments had on the projections.

36. The Recommendation Statement also describes J.P. Morgan's fairness opinion and the various valuation analyses performed in support of its opinion. However, the description of J.P. Morgan's fairness opinion and analyses fails to include key inputs and assumptions underlying these analyses. Without this information, as described below, GenMark's public stockholders are unable to fully understand these analyses and, thus, are unable to determine what weight, if any, to place on J.P. Morgan's fairness opinion in determining whether to tender their shares in the Proposed Transaction or seek appraisal.

37. With respect to J.P. Morgan's *Public Trading Multiples* analysis and *Selected Transaction Analysis*, the Recommendation Statement fails to disclose the individual multiples and financial metrics for each of the companies and transactions analyzed, respectively, or, at a minimum, the mean, median, high and low multiples observed.

38. With respect to J.P. Morgan's *Discounted Cash Flow Analysis*, the Recommendation Statement fails to disclose: (i) the unlevered free cash flow ("UFCF") the Company is expected to generate during calendar years 2021 through 2030, as well as the definition of UFCF and all underlying line items; (ii) the terminal value of the Company; (iii) quantification of the inputs and assumptions underlying the discount rate range of 10.0% to 12.0%; (iv) the Company's net cash as of December 31, 2020; and (v) the number of GenMark's outstanding shares.

39. The omission of this information renders the statements in the "Company Management's Unaudited Prospective Financial Information" and "Opinion of the Company's Financial Advisor" sections of the Recommendation Statement false and/or materially misleading in contravention of the Exchange Act.

***Material Omissions Concerning the Background of the Proposed Transaction***

40. The Recommendation Statement fails to disclose material information concerning the background of the Proposed Transaction.

41. For example, the Recommendation Statement sets forth that the Company entered into confidentiality agreements with potential bidders referred to in the Recommendation Statement as "Party A," "Party B," "Party C," "Party D," "Party F," and "Party H." The Recommendation Statement, however, fails to disclose whether the confidentiality agreements include "don't-ask, don't-waive" ("DADW") standstill provisions that are still in effect and presently precluding any potential counterparty from submitting a topping bid for GenMark.

42. The failure to disclose the existence of DADW provisions creates the false impression that a potential bidder who entered into a confidentiality agreement could make a superior proposal for GenMark. If the potential acquirer's confidentiality agreement contains a DADW provision, then that potential bidder can only make a superior proposal by (i) breaching the confidentiality agreement—since in order to make the superior proposal, it would have to ask for a waiver, either directly or indirectly; or by (ii) being released from the agreement, which if action has been done, is omitted from the Recommendation Statement.

43. Any reasonable GenMark stockholder would deem the fact that a likely topping bidder may be precluded from making a topping bid for the Company to significantly alter the total mix of information.

44. The omission of this information renders the statements in the "Background of the Transactions" section of the Registration Statement false and/or materially misleading in contravention of the Exchange Act.

***Material Omissions Concerning Company Insiders' Potential Conflicts of Interest***

45. The Registration Statement fails to disclose material information concerning the potential conflicts of interest faced by Company insiders.

46. The Registration Statement fails to disclose whether any of GenMark's executive officers or directors are continuing their employment following consummation of the Proposed Transaction, as well as the details of all employment and retention-related discussions and negotiations that occurred between Roche and GenMark's executive officers, including who participated in all such communications, when they occurred and their content. The Registration Statement further fails to disclose whether any of Roche's proposals or indications of interest mentioned management retention in the combined company following the Proposed Transaction or the purchase of or participation in the equity of the surviving corporation.

47. Communications regarding post-transaction employment and merger-related benefits during the negotiation of the underlying transaction must be disclosed to stockholders. This information is necessary for GenMark's stockholders to understand potential conflicts of interest of management and the Board, as that information provides illumination concerning motivations that would prevent fiduciaries from acting solely in the best interests of the Company's stockholders.

48. The omission of this material information renders the statements in the “Background of the Transactions” and “Arrangements with the Company’s Executive Officers and Directors” sections of the Registration Statement false and/or materially misleading in contravention of the Exchange Act.

49. The Individual Defendants were aware of their duty to disclose the above-referenced omitted information and acted negligently (if not deliberately) in failing to include this information in the Recommendation Statement. Absent disclosure of the foregoing material information prior to the expiration of the Tender Offer, Plaintiff and the other GenMark stockholders will be unable to make an informed decision whether to tender their shares in the Proposed Transaction or seek appraisal and are thus threatened with irreparable harm warranting the injunctive relief sought herein.

**CLAIMS FOR RELIEF**

**COUNT I**

**Claims Against All Defendants for Violations  
of Section 14(e) of the Exchange Act**

50. Plaintiff repeats all previous allegations as if set forth in full.

51. Defendants violated Section 14(e) of the Exchange Act by issuing the Recommendation Statement in which they made untrue statements of material facts or failed to state all material facts necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, or engaged in deceptive or manipulative acts or practices, in connection with the Tender Offer commenced in conjunction with the Proposed Transaction.

52. Defendants knew that Plaintiff would rely upon their statements in the Recommendation Statement in determining whether to tender his shares pursuant to the Tender Offer or seek appraisal.

53. As a direct and proximate result of these defendants' unlawful course of conduct in violation of Section 14(e) of the Exchange Act, absent injunctive relief from the Court, Plaintiff has sustained and will continue to sustain irreparable injury by being denied the opportunity to make an informed decision in deciding whether or not to tender his shares or seek appraisal.

## **COUNT II**

### **Claims Against the Individual Defendants for Violation of Section 20(a) of the Exchange Act**

54. Plaintiff repeats all previous allegations as if set forth in full.

55. The Individual Defendants acted as controlling persons of GenMark within the meaning of Section 20(a) of the Exchange Act as alleged herein. By virtue of their positions as officers or directors of GenMark and participation in or awareness of the Company's operations or intimate knowledge of the false statements contained in the Recommendation Statement filed with the SEC, they had the power to influence and control and did influence and control, directly or indirectly, the decision-making of the Company, including the content and dissemination of the various statements which Plaintiff contends are false and misleading.

56. Each of the Individual Defendants was provided with or had unlimited access to copies of the Recommendation Statement and other statements alleged by Plaintiff to be misleading prior to or shortly after these statements were issued and had the ability to prevent the issuance of the statements or cause the statements to be corrected.

57. In particular, each of the Individual Defendants had direct and supervisory involvement in the day-to-day operations of the Company, and, therefore, is presumed to have had the power to control or influence the particular transactions giving rise to the securities violations as alleged herein, and exercised the same. The Recommendation Statement at issue contains the unanimous recommendation of each of the Individual Defendants to approve the Proposed Transaction. They were, thus, directly involved in the making of this document.

58. In addition, as the Recommendation Statement sets forth at length, and as described herein, the Individual Defendants were each involved in negotiating, reviewing, and approving the Proposed Transaction. The Recommendation Statement purports to describe the various issues and information that they reviewed and considered — descriptions which had input from the Individual Defendants.

59. By virtue of the foregoing, the Individual Defendants have violated section 20(a) of the Exchange Act.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff demands judgment and preliminary and permanent relief, including injunctive relief, in his favor on behalf of GenMark, and against defendants, as follows:

- A. Preliminarily and permanently enjoining defendants and all persons acting in concert with them from proceeding with, consummating, or closing the Proposed Transaction;
- B. In the event defendants consummate the Proposed Transaction, rescinding it and setting it aside or awarding rescissory damages to Plaintiff;
- C. Awarding Plaintiff the costs of this action, including reasonable allowance for Plaintiff's attorneys' and experts' fees; and
- D. Granting such other and further relief as this Court may deem just and proper.

**JURY DEMAND**

Plaintiff demands a trial by jury on all claims and issues so triable.

Dated: April 2, 2021

**WEISSLAW LLP**

By: /s/ Joel E. Elkins

Joel E. Elkins

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Beverly Hills, CA 90210

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-and-

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Facsimile: 212/682-3010

*Attorneys for Plaintiff*

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	)
MICHAEL S. KAGNOFF,	)
	)
Defendants.	) JURY TRIAL DEMANDED

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

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

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.

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**

28. The defendants filed a materially incomplete and misleading Recommendation Statement with the SEC and disseminated it to GenMark's stockholders. The Recommendation Statement misrepresents or omits material information that is necessary for the Company's stockholders to make an informed decision whether to tender their shares in the Proposed Transaction or seek appraisal.

29. Specifically, as set forth below, the Recommendation Statement fails to provide Company stockholders with material information or provides them with materially misleading information concerning: (a) GenMark's financial projections and the data and inputs underlying the financial valuation analyses that support the fairness opinion provided by J.P. Morgan; (b) the background leading to the Proposed Transaction and (c) Company insiders' potential conflicts of interest.

***Material Omissions Concerning GenMark's Financial Projections and J.P. Morgan's Financial Analyses***

30. The Recommendation Statement omits material information regarding the Company's financial projections.

31. For example, the Recommendation Statement discloses "risk-adjusted summary selected unaudited projected financial information for the Company on a standalone basis for calendar years 2021 through 2030 prepared by management..." Recommendation Statement at 26. The Recommendation Statement, however, fails to disclose: (a) the specific risk adjustments Company management made to derive the risk-adjusted projections; (b) Company management's basis and assumptions underlying the risk adjustments; and (c) the non-risk-adjusted projections so GenMark stockholders can evaluate the financial impact the Company's risk-adjustments had on the projections.

32. The Recommendation Statement also describes J.P. Morgan's fairness opinion and the various valuation analyses performed in support of its opinion. However, the description of J.P. Morgan's fairness opinion and analyses fails to include key inputs and assumptions underlying these analyses. Without this information, as described below, GenMark's public stockholders are unable to fully understand these analyses and, thus, are unable to determine what weight, if any, to place on J.P. Morgan's fairness opinion in determining whether to tender their shares in the Proposed Transaction or seek appraisal.

33. With respect to J.P. Morgan's *Public Trading Multiples* analysis and *Selected Transaction Analysis*, the Recommendation Statement fails to disclose the individual multiples and financial metrics for each of the companies and transactions analyzed, respectively, or, at a minimum, the mean, median, high and low multiples observed.

34. With respect to J.P. Morgan's *Discounted Cash Flow Analysis*, the Recommendation Statement fails to disclose: (a) the unlevered free cash flow ("UFCF") the Company is expected to generate during calendar years 2021 through 2030, as well as the definition of UFCF and all underlying line items; (b) the terminal value of the Company; (c) quantification of the inputs and assumptions underlying the discount rate range of 10.0% to 12.0%; (d) the Company's net cash as of December 31, 2020; and (e) the number of GenMark's outstanding shares.

35. The omission of this information renders the statements in the "Company Management's Unaudited Prospective Financial Information" and "Opinion of the Company's Financial Advisor" sections of the Recommendation Statement false and/or materially misleading in contravention of the Exchange Act.

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***Material Omissions Concerning the Background of the Proposed Transaction***

36. The Recommendation Statement fails to disclose material information concerning the background of the Proposed Transaction.

37. For example, the Recommendation Statement sets forth that the Company entered into confidentiality agreements with potential bidders referred to in the Recommendation Statement as “Party A,” “Party B,” “Party C,” “Party D,” “Party F,” and “Party H.” The Recommendation Statement, however, fails to disclose whether the confidentiality agreements include “don’t-ask, don’t-waive” (“DADW”) standstill provisions that are still in effect and presently precluding any potential counterparty from submitting a topping bid for GenMark.

38. The failure to disclose the existence of DADW provisions creates the false impression that a potential bidder who entered into a confidentiality agreement could make a superior proposal for GenMark. If the potential acquirer’s confidentiality agreement contains a DADW provision, then that potential bidder can only make a superior proposal by (a) breaching the confidentiality agreement—since in order to make the superior proposal, it would have to ask for a waiver, either directly or indirectly; or by (b) being released from the agreement, which if action has been done, is omitted from the Recommendation Statement.

39. Any reasonable GenMark stockholder would deem the fact that a likely topping bidder may be precluded from making a topping bid for the Company to significantly alter the total mix of information.

40. The omission of this information renders the statements in the “Background of the Transactions” section of the Registration Statement false and/or materially misleading in contravention of the Exchange Act.

***Material Omissions Concerning Company Insiders’ Potential Conflicts of Interest***

41. The Registration Statement fails to disclose material information concerning the potential conflicts of interest faced by Company insiders.

42. The Registration Statement fails to disclose whether any of GenMark’s executive officers or directors are continuing their employment following consummation of the Proposed Transaction, as well as the details of all employment and retention-related discussions and negotiations that occurred between Roche and GenMark’s executive officers, including who participated in all such communications, when they occurred and their content. The Registration Statement further fails to disclose whether any of Roche’s proposals or indications of interest mentioned management retention in the combined company following the Proposed Transaction or the purchase of or participation in the equity of the surviving corporation.

43. Communications regarding post-transaction employment and merger-related benefits during the negotiation of the underlying transaction must be disclosed to stockholders. This information is necessary for GenMark’s stockholders to understand potential conflicts of interest of management and the Board, as that information provides illumination concerning motivations that would prevent fiduciaries from acting solely in the best interests of the Company’s stockholders.

44. The omission of this material information renders the statements in the “Background of the Transactions” and “Arrangements with the Company’s Executive Officers and Directors” sections of the Registration Statement false and/or materially misleading in contravention of the Exchange Act.

45. The Individual Defendants were aware of their duty to disclose the above-referenced omitted information and acted negligently (if not deliberately) in failing to include this information in the Recommendation Statement. Absent disclosure of the foregoing material information prior to the expiration of the Tender Offer, Plaintiff and the other GenMark stockholders will be unable to make an informed decision whether to tender their shares in the Proposed Transaction or seek appraisal and are thus threatened with irreparable harm warranting the injunctive relief sought herein.

## **CLAIMS FOR RELIEF**

### **COUNT I**

#### **Claims Against All Defendants for Violations of Section 14(d) of the Exchange Act and SEC Rule 14d-9**

46. Plaintiff repeats all previous allegations as if set forth in full.

47. Section 14(d)(4) of the Exchange Act and SEC Rule 14d-9 promulgated thereunder require full and complete disclosure in connection with tender offers.

48. The Recommendation Statement violates Section 14(d)(4) and Rule 14d-9 because it omits material facts, including those set forth above, which omission renders the Recommendation Statement false and/or misleading.

49. Defendants knowingly or with deliberate recklessness omitted the material information identified above from the Recommendation Statement, causing certain statements therein to be materially incomplete and therefore misleading. Indeed, while defendants undoubtedly had access to and/or reviewed the omitted material information in connection with approving the Proposed Transaction, they allowed it to be omitted from the Recommendation Statement, rendering certain portions of the Recommendation Statement materially incomplete and therefore misleading.

50. The misrepresentations and omissions in the Recommendation Statement are material to Plaintiff and the other stockholders of the Company, who will be deprived of their right to make an informed decision whether to tender their shares or seek appraisal if such misrepresentations and omissions are not corrected prior to the expiration of the Tender Offer. Plaintiff has no adequate remedy at law. Only through the exercise of this Court's equitable powers can Plaintiff be fully protected from the immediate and irreparable injury that defendants' actions threaten to inflict.

## **COUNT II**

### **Claims Against All Defendants for Violations of Section 14(e) of the Exchange Act**

51. Plaintiff repeats all previous allegations as if set forth in full.

52. Defendants violated Section 14(e) of the Exchange Act by issuing the Recommendation Statement in which they made untrue statements of material facts or failed to state all material facts necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, or engaged in deceptive or manipulative acts or practices, in connection with the Tender Offer.

53. Defendants knew that Plaintiff would rely upon their statements in the Recommendation Statement in determining whether to tender her shares pursuant to the Tender Offer or seek appraisal.

54. As a direct and proximate result of these defendants' unlawful course of conduct in violation of Section 14(e) of the Exchange Act, absent injunctive relief from the Court, Plaintiff has sustained and will continue to sustain irreparable injury by being denied the opportunity to make an informed decision in deciding whether or not to tender her shares or seek appraisal.

### **COUNT III**

#### **Claims Against the Individual Defendants for Violation of Section 20(a) of the Exchange Act**

55. Plaintiff repeats all previous allegations as if set forth in full.

56. The Individual Defendants acted as controlling persons of GenMark within the meaning of Section 20(a) of the Exchange Act as alleged herein. By virtue of their positions as officers or directors of GenMark and participation in or awareness of the Company's operations or intimate knowledge of the false statements contained in the Recommendation Statement filed with the SEC, they had the power to influence and control and did influence and control, directly or indirectly, the decision-making of the Company, including the content and dissemination of the various statements which Plaintiff contends are false and misleading.

57. Each of the Individual Defendants was provided with or had unlimited access to copies of the Recommendation Statement and other statements alleged by Plaintiff to be misleading prior to or shortly after these statements were issued and had the ability to prevent the issuance of the statements or cause the statements to be corrected.

58. In particular, each of the Individual Defendants had direct and supervisory involvement in the day-to-day operations of the Company, and, therefore, is presumed to have had the power to control or influence the particular transactions giving rise to the securities violations as alleged herein, and exercised the same. The Recommendation Statement at issue contains the unanimous recommendation of each of the Individual Defendants to approve the Proposed Transaction. They were, thus, directly involved in the making of this document.

59. In addition, as the Recommendation Statement sets forth at length, and as described herein, the Individual Defendants were each involved in negotiating, reviewing, and approving the Proposed Transaction. The Recommendation Statement purports to describe the various issues and information that they reviewed and considered — descriptions which had input from the Individual Defendants.

60. By virtue of the foregoing, the Individual Defendants have violated section 20(a) of the Exchange Act.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff demands judgment and preliminary and permanent relief, including injunctive relief, in his favor on behalf of GenMark, and against defendants, as follows:

A. Preliminarily and permanently enjoining defendants and all persons acting in concert with them from proceeding with, consummating, or closing the Proposed Transaction;

B. In the event defendants consummate the Proposed Transaction, rescinding it and setting it aside or awarding rescissory damages to Plaintiff;

- C. Awarding Plaintiff the costs of this action, including reasonable allowance for Plaintiff's attorneys' and experts' fees; and
- D. Granting such other and further relief as this Court may deem just and proper.

**JURY DEMAND**

Plaintiff demands a trial by jury on all claims and issues so triable.

Dated: April 5, 2021

**LONG LAW, LLC**

By: */s/ Brian D. Long*

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*Counsel for Plaintiff*

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

RICK TURPIN,  
Plaintiff,

v.

GENMARK DIAGNOSTICS, INC., KEVIN C. O'BOYLE, DARYL J.  
FAULKNER, JAMES FOX, LISA GILES, and MICHAEL KAGNOFF,

Defendants.

Case No:

JURY TRIAL DEMANDED

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

Plaintiff Rick Turpin ("Plaintiff"), 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 upon information and belief as to all other matters, based upon, *inter alia*, the investigation conducted by and through Plaintiff's attorneys.

**NATURE OF THE ACTION**

1. This is an action against GenMark Diagnostics, Inc. ("GenMark" or the "Company") and its Board of Directors (the "Board" or the "Individual Defendants") for their violations of Sections 14(e), 14(d)(4), and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §§ 78n(e), 78n(d)(4), and 78t(a), and Rule 14d-9 promulgated thereunder by the SEC, 17 C.F.R. § 240.14d-9, in connection with the proposed acquisition (the "Proposed Transaction") of GenMark by Geronimo Acquisition Corp. ("Merger Sub"), a wholly owned subsidiary of Roche Holdings, Inc. ("Roche").

**JURISDICTION AND VENUE**

2. The claims asserted herein arise under and pursuant to Sections 14(e), 14(d)(4), and 20(a) of the Exchange Act (15 U.S.C. §§ 78n(e), 78n(d)(4), and 78t(a)) and Rule 14d-9 promulgated thereunder by the SEC (17 C.F.R. § 240.14d-9).

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 District pursuant to 28 U.S.C. § 1391(b) and Section 27 of the Exchange Act (15 U.S.C. § 78aa(c)) as a substantial portion of the transactions and wrongs complained of herein had an effect in this District, the alleged misstatements entered and the subsequent damages occurred in this District, and the Company conducts business in New York City.<sup>1</sup>

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 is, and has been at all relevant times hereto, an owner of Genmark common stock.

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<sup>1</sup> For example, the Company reportedly participated in conferences in New York City in recent years.

7. Defendant GenMark is a molecular diagnostics company that engages in the developing and commercializing molecular panels based on its proprietary eSensor electrochemical detection technology. The Company is incorporated in Delaware. The Company's common stock trades on the Nasdaq under the ticker symbol, "GNMK."

8. Defendant Kevin C. O'Boyle ("O'Boyle") is Chairman of the Board of the Company.

9. Defendant Daryl J. Faulkner ("Faulkner") is a director of the Company.

10. Defendant James Fox ("Fox") is a director of the Company.

11. Defendant Lisa Giles ("Giles") is a director of the Company.

12. Defendant Michael Kagnoff ("Kagnoff") is a director of the Company.

13. Defendants O'Boyle, Faulkner, Fox, Giles, and Kagnoff are collectively referred to herein as the "Individual Defendants."

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

## **SUBSTANTIVE ALLEGATIONS**

### **A. The Proposed Transaction**

15. On March 15, 2021, GenMark and Roche announced that they had entered into a definitive merger agreement for Roche to acquire GenMark for \$24.05 per share in an all-cash transaction. The press release announcing the Proposed Transaction states, in pertinent part:

**Roche signs definitive merger agreement with GenMark Diagnostics, Inc., to access novel technology to test for broad range of pathogens with one patient sample**

March 15, 2021 02:00 ET | Source: F. Hoffmann-La Roche Ltd

- **Roche to acquire GenMark Diagnostics for US\$ 24.05 per share with the expectation to close in the 2nd quarter of 2021**
- **GenMark provides molecular diagnostic tests that are designed to detect multiple pathogens from a single patient sample**
- **GenMark’s ePlex platform delivers rapid and actionable results so clinicians can determine the cause of infection and the most effective treatment, potentially saving lives and alleviating the healthcare burden. The addition of GenMark’s proprietary multiplex technology complements Roche’s diagnostic offering, addressing a broad range of infectious disease testing needs, including respiratory and bloodstream infections**

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.

Citi is acting as financial advisor to Roche and Sidley Austin LLP is acting as legal counsel to Roche. J.P. Morgan Securities LLC is acting as exclusive financial advisor to GenMark and DLA Piper LLP is acting as legal counsel to GenMark.

### **About GenMark Diagnostics**

GenMark Diagnostics is a leading provider of multiplex molecular diagnostic solutions designed to enhance patient care, improve key quality metrics and reduce the total cost-of-care. Utilizing GenMark’s proprietary eSensor® detection technology, GenMark’s eSensor XT-8® and ePlex® systems are designed to support a broad range of molecular diagnostic sample-to-answer tests with compact, easy-to-use workstations and self-contained, disposable test cartridges. GenMark’s ePlex: The True Sample-to-Answer Solution™ is designed to optimize laboratory efficiency and address a broad range of infectious disease testing needs, including respiratory, bloodstream and gastrointestinal infections.

### **About Roche**

Roche is a global pioneer in pharmaceuticals and diagnostics focused on advancing science to improve people’s lives. The combined strengths of pharmaceuticals and diagnostics under one roof have made Roche the leader in personalised healthcare – a strategy that aims to fit the right treatment to each patient in the best way possible.

Roche is the world's largest biotech company, with truly differentiated medicines in oncology, immunology, infectious diseases, ophthalmology and diseases of the central nervous system. Roche is also the world leader in in vitro diagnostics and tissue-based cancer diagnostics, and a frontrunner in diabetes management.

Founded in 1896, Roche continues to search for better ways to prevent, diagnose and treat diseases and make a sustainable contribution to society. The company also aims to improve patient access to medical innovations by working with all relevant stakeholders. More than thirty medicines developed by Roche are included in the World Health Organization Model Lists of Essential Medicines, among them life-saving antibiotics, antimalarials and cancer medicines. Moreover, for the twelfth consecutive year, Roche has been recognised as one of the most sustainable companies in the Pharmaceuticals Industry by the Dow Jones Sustainability Indices (DJSI).

The Roche Group, headquartered in Basel, Switzerland, is active in over 100 countries and in 2020 employed more than 100,000 people worldwide. In 2020, Roche invested CHF 12.2 billion in R&D and posted sales of CHF 58.3 billion. Genentech, in the United States, is a wholly owned member of the Roche Group. Roche is the majority shareholder in Chugai Pharmaceutical, Japan. For more information, please visit [www.roche.com](http://www.roche.com).

16. On March 25, 2021, the Company filed a Schedule 14D-9 Solicitation/Recommendation Statement under Section 14(d)(4) of the Exchange Act (the "Solicitation Statement") with the SEC in connection with the Proposed Transaction.

**B. The Solicitation Statement Contains Materially False and Misleading Statements and Omissions**

17. The Solicitation Statement, which recommends that GenMark shareholders tender their shares to Merger Sub in connection with the Proposed Transaction, omits and/or misrepresents material information concerning: (i) the Company's financial projections; (ii) the financial analyses performed by the Company's financial advisor, J.P. Morgan Securities LLC ("J.P. Morgan"), in connection with its fairness opinion; and (iii) the sales process leading up to the Proposed Transaction.

18. The omission of the material information (referenced below) renders the following sections of the Solicitation Statement false and misleading, among others: (i) Background of the Transactions; (ii) Reasons for the Recommendation of the Board; (iii) Recommendation of the Board; (iv) Opinion of the Company's Financial Advisor; and (v) Company Management's Unaudited Prospective Financial Information.

19. The tender offer in connection with the Proposed Transaction is set to expire at midnight, New York City time, at the end of April 21, 2021 (the "Expiration Date"). It is imperative that the material information that was omitted from the Solicitation Statement be disclosed to the Company's shareholders prior to the Expiration Date to enable them to make an informed decision as to whether to tender their shares. Plaintiff may seek to enjoin Defendants from closing the tender offer or the Proposed Transaction unless and until the material misstatements and omissions (referenced below) are remedied. In the event the Proposed Transaction is consummated, Plaintiff may seek to recover damages resulting from Defendants' misconduct.

**1. Material Omissions Concerning the Company's Financial Projections**

20. The Solicitation Statement omits material information concerning the Company's financial projections.

21. The Solicitation Statement provides a purported table of "risk-adjusted . . . selected unaudited projected financial information for the Company on a standalone basis for calendar years 2021 through 2030 prepared by management in connection with the review of the [Proposed Transaction]" (the "Projections").

22. With respect to the Projections, the Solicitation Statement fails to disclose: (1) the specific risk adjustments Company management made to derive the risk-adjusted projections; (2) Company management's inputs and assumptions underlying the risk adjustments; (3) the non-risk-adjusted projections so GenMark shareholders can assess and evaluate the impact the Company's risk-adjustments had on the Projections; (4) all line items underlying EBITDA; and (5) a reconciliation of all non-GAAP to GAAP metrics.

23. The disclosure of this information is material because it would provide the Company's shareholders with a basis to project the future financial performance of the Company and would allow shareholders to better understand the financial analyses performed by the Company's financial advisor in support of its fairness opinion. Shareholders cannot hope to replicate management's inside view of the future prospects of the Company. Without such information, which is uniquely possessed by Defendant(s) and the Company's financial advisor, the Company's shareholders are unable to determine how much weight, if any, to place on the Company's financial advisor's fairness opinion in determining whether to tender their shares in connection with the Proposed Transaction.

24. When a company discloses non-GAAP financial metrics in a Solicitation Statement that were relied upon by its board of directors in recommending that shareholders exercise their corporate suffrage rights in a particular manner, the company must also disclose, pursuant to SEC Regulation G, all projections and information necessary to make the non-GAAP metrics not misleading, and must provide a reconciliation (by schedule or other clearly understandable method) of the differences between the non-GAAP financial metrics disclosed or released with the most comparable financial metrics calculated and presented in accordance with GAAP. 17 C.F.R. § 244.100.<sup>2</sup>

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<sup>2</sup> Mary Jo White, *Keynote Address, International Corporate Governance Network Annual Conference: Focusing the Lens of Disclosure to Set the Path Forward on Board Diversity, Non-GAAP, and Sustainability* (June 27, 2016), <https://www.sec.gov/news/speech/chair-white-icgn-speech.html> (footnotes omitted) (last visited Apr. 5, 2021) ("And last month, the staff issued guidance addressing a number of troublesome practices which can make non-GAAP disclosures

25. The above-referenced omitted information, if disclosed, would significantly alter the total mix of information available to the Company's shareholders.

## 2. Material Omissions Concerning J.P. Morgan's Analyses

26. In connection with the Proposed Transaction, the Solicitation Statement omits material information concerning analyses performed by J.P. Morgan.

27. With respect to J.P. Morgan's "*Public Trading Multiples*" and "*Selected Transaction Analysis*," the Solicitation Statement fails to disclose the individual multiples and financial metrics of each company and transaction J.P. Morgan observed in its analyses.

28. The Solicitation Statement fails to disclose the following concerning J.P. Morgan's "*Discounted Cash Flow Analysis*": (1) the unlevered free cash flow that the Company is expected to generate during calendar years 2021 through 2030, and all underlying line items; (2) the range of terminal values for the Company; (3) the individual inputs and assumptions underlying the (i) perpetual growth rates ranging from 2.5% to 3.5%, and (ii) discount rates ranging from 10.0% to 12.0%; (3) net cash as of December 31, 2020; and (4) the number of outstanding shares on a fully-diluted basis.

29. The valuation methods, underlying assumptions, and key inputs used by J.P. Morgan in rendering its purported fairness opinion must be fairly disclosed to the Company's shareholders. The description of J.P. Morgan's fairness opinion and analyses, however, fails to include key inputs and assumptions underlying those analyses. Without the information described above, the Company's shareholders are unable to fully understand J.P. Morgan's fairness opinion and analyses, and are thus unable to determine how much weight, if any, to place on them in determining whether to tender their shares in connection with the Proposed Transaction. This omitted information, if disclosed, would significantly alter the total mix of information available to the Company's shareholders.

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misleading: the lack of equal or greater prominence for GAAP measures; exclusion of normal, recurring cash operating expenses; individually tailored non- GAAP revenues; lack of consistency; cherry-picking; and the use of cash per share data. I strongly urge companies to carefully consider this guidance and revisit their approach to non-GAAP disclosures.”).

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### **3. Material Omissions Concerning the Sales Process Leading up to the Proposed Transaction**

30. The Solicitation Statement omits material information concerning the sales process leading up to the Proposed Transaction.

31. The Solicitation Statement provides that, during the sales process, the Company entered into confidentiality agreements with multiple potential buyers.

32. The Solicitation Statement, however, fails to disclose the terms of all confidentiality agreements, including whether such agreements contained standstill provisions with “don’t ask, don’t waive” (DADW) provisions (including their time of enforcement) that would preclude interested parties from making superior offers for the Company.

33. Without this information, GenMark shareholders may have the mistaken belief that potential suitors are or were permitted to submit superior proposals for the Company, when in fact they are or were contractually prohibited from doing so. This information is material because a reasonable GenMark shareholder would want to know, prior to tendering their shares in connection with the Proposed Transaction, whether other potential buyers are or were foreclosed from submitting a superior proposal.

34. The above-referenced omitted information, if disclosed, would significantly alter the total mix of information available to the Company’s shareholders.

**COUNT I**  
**For Violations of Section 14(e) of the Exchange Act**  
**Against All Defendants**

35. Plaintiff repeats and re-alleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

36. Section 14(e) of the Exchange Act states, in relevant part:

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading . . . in connection with any tender offer or request or invitation for tenders[.]

37. During the relevant period, Defendants, individually and in concert, directly or indirectly, disseminated or approved the false and misleading Solicitation Statement specified above, which 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, in violation of Section 14(e) of the Exchange Act.

38. Each of the Individual Defendants, by virtue of their positions within the Company as officers and/or directors, were aware of materially false and/or misleading and/or omitted information but failed to disclose such information, in violation of Section 14(e) of the Exchange Act. Defendants, by use of the mails and means and instrumentalities of interstate commerce, solicited and/or permitted the use of their names to file and disseminate the Solicitation Statement with respect to the Proposed Transaction.

39. The false and misleading statements and omissions in the Solicitation Statement are material in that a reasonable shareholder would consider them important in deciding whether to tender their shares in connection with the Proposed Transaction.

40. Defendants acted knowingly or with deliberate recklessness in filing or causing the filing of the materially false and misleading Solicitation Statement.

41. By reason of the foregoing, Defendants violated Section 14(e) of the Exchange Act.

42. Because of the false and misleading statements in the Solicitation Statement, Plaintiff is threatened with irreparable harm.

**COUNT II**  
**For Violations of Section 14(d)(4) of the Exchange Act and Rule 14d-9 Promulgated**  
**Thereunder**  
**Against All Defendants**

43. Plaintiff repeats and re-alleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

44. Defendants caused the Solicitation Statement to be issued with the intent to solicit shareholder support for the Proposed Transaction.

45. Section 14(d)(4) of the Exchange Act and SEC Rule 14d-9 promulgated thereunder require full and complete disclosure in connection with tender offers. Specifically, Section 14(d)(4) states, in relevant part:

Any solicitation or recommendation to the holders of such a security to accept or reject a tender offer or request or invitation for tenders shall be made in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

46. SEC Rule 14d-9(d), adopted to implement Section 14(d)(4) of the Exchange Act, states, in relevant part:

Any solicitation or recommendation to holders of a class of securities referred to in section 14(d)(1) of the Act with respect to a tender offer for such securities shall include the name of the person making such solicitation or recommendation and the information required by Items 1 through 8 of Schedule 14D-9 (§ 240.14d-101) or a fair and adequate summary thereof[.]

47. In accordance with SEC Rule 14d-9, Item 8 of Schedule 14D-9 requires that a company:

Furnish such additional material information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not materially misleading.

48. During the relevant period, Defendants, individually and in concert, directly or indirectly, disseminated or approved the false and misleading Solicitation Statement specified above, which 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, in violation of Section 14(d)(4) of the Exchange Act and SEC Rule 14d-9.

49. Each of the Individual Defendants, by virtue of their positions within the Company as officers and/or directors, were aware of materially false and/or misleading and/or omitted information but failed to disclose such information, in violation of Section 14(d)(4) of the Exchange Act and SEC Rule 14d-9. Defendants, by use of the mails and means and instrumentalities of interstate commerce, solicited and/or permitted the use of their names to file and disseminate the Solicitation Statement with respect to the Proposed Transaction.

50. Defendants acted knowingly or with deliberate recklessness in filing the materially false and misleading Solicitation Statement which omitted material information.

51. The false and misleading statements and omissions in the Solicitation Statement are material in that a reasonable shareholder would consider them important in deciding whether to tender their shares in connection with the Proposed Transaction.

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

52. Plaintiff repeats and re-alleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

53. The Individual Defendants acted as control persons of the Company within the meaning of Section 20(a) of the Exchange Act as alleged herein. By virtue of their senior positions as officers and/or directors of the Company and participation in and/or awareness of the Company's operations and/or intimate knowledge of the false statements contained in the Solicitation Statement filed with the SEC, they had the power to and did influence and control, directly or indirectly, the decision-making of the Company, including the content and dissemination of the false and misleading Solicitation Statement.

54. Each of the Individual Defendants was provided with or had unlimited access to copies of the Solicitation Statement and other statements alleged by Plaintiff to be misleading prior to and/or shortly after these statements were issued and had the ability to prevent the issuance of the statements or cause the statements to be corrected. 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 Solicitation Statement, and to correct promptly any public statements issued by the Company which were or had become materially false or misleading.

55. In particular, each of the Individual Defendants had direct and supervisory involvement in the operations of the Company, and, therefore, is presumed to have had the power to control or influence the particular transactions giving rise to the securities violations as alleged herein, and exercised the same. The Individual Defendants were provided with or had unlimited access to copies of the Solicitation Statement and had the ability to prevent the issuance of the statements or to cause the statements to be corrected. The Solicitation Statement at issue contains the recommendation of the Individual Defendants to tender their shares pursuant to the Proposed Transaction. Thus, the Individual Defendants were directly involved in the making of the Solicitation Statement.

56. In addition, as the Solicitation Statement sets forth at length, and as described herein, the Individual Defendants were involved in negotiating, reviewing, and approving the Proposed Transaction. The Solicitation Statement purports to describe the various issues and information that they reviewed and considered—descriptions which had input from the Individual Defendants.

57. By virtue of the foregoing, the Individual Defendants have violated Section 20(a) of the Exchange Act.

58. As set forth above, the Individual Defendants had the ability to exercise control over and did control a person or persons who have each violated Sections 14(e), 14(d)(4), and Rule 14d-9 promulgated thereunder, by their acts and omissions as alleged herein. By virtue of their positions as controlling persons, the Individual Defendants are liable pursuant to Section 20(a) of the Exchange Act. As a direct and proximate result of Defendants' conduct, the Company's shareholders will be irreparably harmed.

**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff prays for judgment and relief as follows:

- A. Preliminarily and permanently enjoining Defendants and all persons acting in concert with them from proceeding with, consummating, or closing the Proposed Transaction and the tender offer in connection with the Proposed Transaction, unless and until Defendants disclose and disseminate the material information identified above to the Company's shareholders;
- B. In the event Defendants consummate the Proposed Transaction, rescinding it and setting it aside or awarding Plaintiff rescissory damages;
- C. Declaring that Defendants violated Sections 14(e), 14(d)(4), and 20(a) of the Exchange Act, and Rule 14d-9 promulgated thereunder;
- D. Awarding Plaintiff reasonable costs and expenses incurred in this action, including counsel fees and expenses and expert fees; and
- E. Granting such other and further relief as the Court may deem just and proper.

**JURY TRIAL DEMANDED**

Plaintiff hereby demands a trial by jury.

Dated: April 5, 2021

Respectfully submitted,

**HALPER SADEH LLP**

By: /s/ Daniel Sadeh

Daniel Sadeh, Esq.

Zachary Halper, Esq. (to be admitted *pro hac vice*)

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*Counsel for Plaintiff*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

ALLAN WANAMAKER,  
Plaintiff,

v.

GENMARK DIAGNOSTICS, INC.,  
KEVIN C. O'BOYLE, DARYL J.  
FAULKNER, JAMES FOX, LISA GILES,  
and MICHAEL KAGNOFF,  
Defendants.

Civil Action No.

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

**JURY TRIAL DEMANDED**

Plaintiff Allan Wanamaker ("Plaintiff") by and through his undersigned attorneys, brings this action on behalf of himself and alleges the following based upon personal knowledge as to those allegations concerning Plaintiff and, as to all other matters, upon the investigation of counsel, which includes, without limitation: (a) review and analysis of public filings made by GenMark Diagnostics, Inc. ("GenMark" or the "Company") and other related parties and non-parties with the United States Securities and Exchange Commission ("SEC"); (b) review and analysis of press releases and other publications disseminated by certain of the Defendants (defined below) and other related non-parties; (c) review of news articles, shareholder communications, and postings on GenMark's website concerning the Company's public statements; and (d) review of other publicly available information concerning GenMark and the Defendants.

## NATURE OF THE ACTION

1. Plaintiff brings this action against the Company and members of the Company's Board of Directors (the "Board" or the "Individual Defendants") for 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 SEC Rule 14d-9, 17 C.F.R. §240.14d-9(d) ("Rule 14d-9"), in connection with the proposed acquisition of the Company via tender offer by Roche Holdings, Inc. ("Parent") and Geronimo Acquisition Corp. ("Merger Sub," and together with Parent, "Roche") (the "Proposed Transaction").

2. On March 12, 2021, GenMark entered into a definitive agreement and plan of merger with Roche (the "Merger Agreement"), pursuant to which Merger Sub commenced a tender offer (the "Tender Offer") to purchase all outstanding shares of GenMark's common stock for \$24.05 per share. The Tender Offer will expire on April 21, 2021.

3. On March 25, 2021, the Company filed an incomplete and materially misleading recommendation statement with the SEC (the "Recommendation Statement") on Form 14D9 in connection with the Proposed Transaction.

4. Accordingly, the failure to adequately disclose such material information constitutes a violation of Sections 14(d), 14(e) and 20(a) of the Exchange Act as GenMark stockholders need such information in order to make a fully informed decision whether to tender their shares in support of the Proposed Transaction.

5. As set forth more fully herein, Plaintiff seeks to enjoin Defendants from proceeding with the Proposed Transaction.

## **JURISDICTION AND VENUE**

6. This Court has subject matter jurisdiction pursuant to Section 27 of the Exchange Act (15 U.S.C. § 78aa) and 28 U.S.C. § 1331 as Plaintiff alleges violations of Sections 14(d)(4), 14(e) and 20(a) of the Exchange Act

7. This Court has personal jurisdiction over all of the Defendants because each is either a corporation that conducts business in, solicits shareholders in, and/or maintains operations within, this District, or is an individual who is either present in this District for jurisdictional purposes or has 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 under 28 U.S.C. § 1391 because a substantial portion of the transactions and wrongs complained of herein occurred in this District. In addition, the Company's common stock trades on the NASDAQ, which is headquartered in this District.

## **THE PARTIES**

9. Plaintiff has been the owner of the common stock of GenMark since prior to the transaction herein complained of and continuously to date.

10. Defendant GenMark is a Delaware corporation with its principal executive offices located at 5964 La Place Court, Carlsbad, California 92008. The Company's stock trades on the NASDAQ under the ticker "GNMK."

11. Defendant Kevin C. O'Boyle ("O'Boyle") is and has been the Chairman of the Board of GenMark at all times during the relevant time period.

12. Defendant Daryl J. Faulkner ("Faulkner") is and has been a director of GenMark at all times during the relevant time period.

13. Defendant James Fox (“Fox”) is and has been a director of GenMark at all times during the relevant time period.
14. Defendant Lisa Giles (“Giles”) is and has been a director of GenMark at all times during the relevant time period.
15. Defendant Michael Kagnoff (“Kagnoff”) is and has been a director of GenMark at all times during the relevant time period.
16. Defendants O’Boyle, Faulker, Fox, Giles, and Kagnoff are collectively referred to herein as the “Individual Defendants.”
17. Defendant GenMark, along with the Individual Defendants, are collectively referred to herein as “Defendants.”

## **SUBSTANTIVE ALLEGATIONS**

### **Background of the Company**

18. GenMark is a leading provider of multiplex molecular diagnostic solutions designed to enhance patient care, improve key quality metrics and reduce the total cost-of-care. Utilizing GenMark’s proprietary eSensor® detection technology, GenMark’s eSensor XT-8® and ePlex® systems are designed to support a broad range of molecular diagnostic sample-to-answer tests with compact, easy-to-use workstations and self-contained, disposable test cartridges. GenMark’s ePlex: The True Sample-to-Answer Solution™ is designed to optimize laboratory efficiency and address a broad range of infectious disease testing needs, including respiratory, bloodstream and gastrointestinal infections.

## The Company Announces the Proposed Transaction

19. On March 15, 2021, GenMark and Centre Lane issued a press release announcing that the Company had entered an agreement in connection with the Proposed Transaction. The press release stated, in pertinent 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.

Citi is acting as financial advisor to Roche and Sidley Austin LLP is acting as legal counsel to Roche. J.P. Morgan Securities LLC is acting as exclusive financial advisor to GenMark and DLA Piper LLP is acting as legal counsel to GenMark.

#### **FALSE AND MISLEADING STATEMENTS AND/OR MATERIAL OMISSIONS IN THE RECOMMENDATION STATEMENT**

20. On March 25, 2021, the Company authorized the filing of the Recommendation Statement with the SEC. The Recommendation Statement recommends that the Company’s stockholders tender their shares in favor of the Proposed Transaction.

21. Defendants were obligated to carefully review the Recommendation Statement prior to its filing with the SEC and dissemination to the Company’s shareholders to ensure that it did not contain any material misrepresentations or omissions. However, the Recommendation Statement misrepresents and/or omits material information that is necessary for the Company’s shareholders to make informed decisions concerning whether to tender their shares in favor of the Proposed Transaction.

**Material False and Misleading Statements or Material  
Misrepresentations or Omissions Regarding Managements Projections**

22. The Recommendation Statement contains financial projections prepared by senior members of GenMark's management in connection with the Proposed Transaction, but fails to provide material information concerning such.

23. The SEC has repeatedly emphasized that disclosure of non-GAAP projections can be inherently misleading, and has therefore heightened its scrutiny of the use of such projections.<sup>1</sup> Indeed, on May 17, 2016, the SEC's Division of Corporation Finance released new and updated Compliance and Disclosure Interpretations ("C&DIs") on the use of non-GAAP financial measures that demonstrate the SEC's tightening policy.<sup>2</sup> One of the new C&DIs regarding forward-looking information, such as financial projections, explicitly requires companies to provide any reconciling metrics that are available without unreasonable efforts.

24. In order to make management's financial projections included in the Recommendation Statement materially complete and not misleading, Defendants must provide a reconciliation table of the non-GAAP measures to the most comparable GAAP measures.

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<sup>1</sup> See, e.g., Nicolas Grabar and Sandra Flow, Non-GAAP Financial Measures: The SEC's Evolving Views, Harvard Law School Forum on Corporate Governance and Financial Regulation (June 24, 2016), *available at* <https://corpgov.law.harvard.edu/2016/06/24/non-gaap-financial-measuresthesecs-evolving-views/>; Gretchen Morgenson, Fantasy Math Is Helping Companies Spin Losses Into Profits, N.Y. Times, Apr. 22, 2016, *available at* [http://www.nytimes.com/2016/04/24/business/fantasy-math-is-helping-companies-spin-ossesinto-profits.html?\\_r=0](http://www.nytimes.com/2016/04/24/business/fantasy-math-is-helping-companies-spin-ossesinto-profits.html?_r=0).

<sup>2</sup> Non-GAAP Financial Measures, Compliance & Disclosure Interpretations, U.S. SECURITIES AND EXCHANGE COMMISSION (May 17, 2017), *available at* <https://www.sec.gov/divisions/corpfin/guidance/nongaapinterp.htm>.

25. Specifically, with respect to all of the Company's applicable projections, the Company must disclose the line item projections for the financial metrics that were used to calculate the non-GAAP measures, including, but not limited to EBITDA

26. Disclosure of the above information is vital to provide investors with the complete mix of information necessary to make an informed decision when deciding whether to tender their shares in support of the Proposed Transaction. Specifically, the above information would provide shareholders with a better understanding of the analyses performed by the Company's financial advisor in support of its opinion.

**Material False and Misleading Statements or Material  
Misrepresentations or Omissions Regarding J.P. Morgan's Opinion Statement**

27. The Recommendation Statement contains the financial analyses and opinion of J.P. Morgan Securities LLC ("J.P. Morgan") concerning the Proposed Transaction but fails to provide material information concerning information such.

28. With respect to J.P. Morgan's *Public Trading Multiples* analysis, the Recommendation Statement fails to disclose the individual multiples and metrics for the specific companies observed in the analysis.

29. With respect to J.P. Morgan's *Selected Transaction Analysis*, the Recommendation Statement fails to disclose the individual multiples and metrics for the specific transactions observed in the analysis.

30. With respect to J.P. Morgan's *Discounted Cash Flow Analysis*, the Recommendation Statement fails to disclose: (i) the Company's terminal values; (ii) the inputs and assumptions underlying J.P. Morgan's use of discount rates of 10.0% to 12.0%; (iii) the inputs and assumptions underlying J.P. Morgan's application of perpetual growth rates of 2.5% to 3.5%; and (iv) the number of fully diluted Company outstanding shares.

31. When a banker's endorsement of the fairness of a transaction is touted to shareholders, the valuation methods used to arrive at that opinion as well as the key inputs and range of ultimate values generated by those analyses must also be fairly disclosed. Moreover, the disclosure of projected financial information is material because it provides stockholders with a basis to project the future financial performance of a company and allows stockholders to better understand the financial analyses performed by the company's financial advisor in support of its fairness opinion.

32. Without the above described information, the Company's shareholders are not fully informed with respect to the Proposed Transaction. Accordingly, in order to provide shareholders with a complete mix of information, the omitted information described above should be disclosed.

**Material False and Misleading Statements or Material  
Misrepresentations or Omissions Regarding the Sales Process**

33. The Recommendation Statement contains information concerning the process leading up to the Proposed Transaction, but fails to include material information concerning such.

34. Specifically, the Recommendation Statement fails to disclose whether any interested parties entered into any "don't ask, don't waive" ("DADW") provisions that would prevent the potential suitor from making a topping bid for the Company.

35. This information is material to shareholders in deciding whether to tender their shares in favor of the Proposed Transaction, as it would show whether or not a superior offer for the Company was available.

**COUNT I**

**(Against All Defendants for Violations of Section 14(d)  
of the Exchange Act and Rule 14d-9 Promulgated Thereunder)**

36. Plaintiff incorporates each and every allegation set forth above as if fully set forth herein.

37. Section 14(d)(4) of the Exchange Act and Rule 14d-9 promulgated thereunder makes it a requirement to make full and complete disclosure in connection with tender offers.

38. As discussed herein, the Recommendation Statement, while soliciting shareholder support for the Proposed Transaction, misrepresent and/or omit material facts concerning the Proposed Transaction.

39. Defendants prepared, reviewed, filed and disseminated the false and misleading Recommendation Statement to GenMark shareholders. In doing so, Defendants knew or recklessly disregarded that the Recommendation Statement 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.

40. The omissions and incomplete and misleading statements in the Recommendation Statement are material in that a reasonable shareholder would consider them important in deciding whether to tender their shares in favor of the Proposed Transaction. In addition, a reasonable investor would view such information as altering the "total mix" of information made available to shareholders.

41. By virtue of their positions within the Company and/or roles in the process and in the preparation of the Recommendation Statement, Defendants were undoubtedly aware of this information and had previously reviewed it, including participating in the Proposed Transaction negotiation and sales process and reviewing GenMark's financial advisor's complete financial analyses purportedly summarized in the Recommendation Statement.

42. The Individual Defendants undoubtedly reviewed and relied upon the omitted information identified above in connection with their decision to approve and recommend the Proposed Transaction.

43. GenMark is deemed negligent as a result of the Individual Defendants' negligence in preparing and reviewing the Recommendation Statement.

44. Defendants knew that Plaintiff would rely upon the Recommendation Statement in determining whether to tender their shares in favor of the Proposed Transaction.

45. As a direct and proximate result of Defendants' unlawful course of conduct in violation of Section 14(d)(4) of the Exchange Act and Rule 14d-9 promulgated thereunder, absent injunctive relief from the Court, Plaintiff will suffer irreparable injury by being denied the opportunity to make an informed decision as to whether to tender their shares in favor of the Proposed Transaction.

46. Plaintiff has no adequate remedy at law.

## **COUNT II**

### **(Against All Defendants for Violation Of Section 14(e) of the Exchange Act)**

47. Plaintiff incorporates each and every allegation set forth above as if fully set forth herein.

48. Defendants violated Section 14(e) of the Exchange Act by issuing the Recommendation Statement in which they made false statements of material fact or failed to state all material facts that would be necessary to make the statements made, in light of the circumstances, not misleading, or engaged in deceptive or manipulative acts or practices, in connection with the Proposed Transaction.

49. Defendants knew that Plaintiff and the Company's shareholders would rely upon their statements made in the Recommendation Statement in determining whether to tender shares in favor of the Proposed Transaction.

50. As a direct and proximate result of Defendants' unlawful course of conduct in violation of Section 14(e) of the Exchange Act, absent injunctive relief from the Court, Plaintiff will suffer irreparable injury by being denied the opportunity to make an informed decision as to whether to tender their shares in favor of the Proposed Transaction.

### **COUNT III**

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

51. Plaintiff incorporates each and every allegation set forth above as if fully set forth herein.

52. The Individual Defendants acted as controlling persons of GenMark within the meaning of Section 20(a) of the Exchange Act as alleged herein. By virtue of their positions as officers and/or directors of GenMark, and participation in and/or awareness of the Company's operations and/or intimate knowledge of the false statements contained in the Recommendation Statement filed with the SEC, they had the power to influence and control and did influence and control, directly or indirectly, the decision-making of the Company, including the content and dissemination of the various statements which Plaintiff contends are false and misleading.

53. Each of the Individual Defendants were provided with or had unlimited access to copies of the Recommendation Statement and other statements alleged by Plaintiff to be misleading prior to and/or shortly after these statements were issued and had the ability to prevent the issuance of the statements or cause the statements to be corrected.

54. In particular, each of the Individual Defendants had direct and supervisory involvement in the day-to-day operations of the Company, and, therefore, is presumed to have had the power to control or influence the particular transactions giving rise to the securities violations alleged herein, and exercised the same. The Recommendation Statement contain the unanimous recommendation of each of the Individual Defendants to approve the Proposed Transaction. They were thus directly connected with and involved in the making of the Recommendation Statement.

55. As set forth above, the Individual Defendants had the ability to exercise control over and did control a person or persons who have each violated Section 14(e) of the Exchange Act, by their acts and omissions as alleged herein. By virtue of their positions as controlling persons and the acts described herein, the Individual Defendants are liable pursuant to Section 20(a) of the Exchange Act.

56. As a direct and proximate result of Individual Defendants' conduct, Plaintiff will be irreparably harmed.

57. Plaintiff has no adequate remedy at law.

#### **PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff prays for judgment and relief as follows:

A. Preliminarily and permanently enjoining Defendants and all persons acting in concert with them from proceeding with, consummating, or closing the Proposed Transaction;

B. Directing the Individual Defendants to disseminate an Amendment to the Recommendation Statement that does not contain any untrue statements of material fact and that states all material facts required in it or necessary to make the statements contained therein not misleading;

- C. Directing Defendants to account to Plaintiff for the damages sustained because of the wrongs complained of herein;
- D. Awarding Plaintiff the costs of this action, including reasonable allowance for Plaintiff's attorneys' and experts' fees; and
- E. Granting such other and further relief as this Court may deem just and proper.

**DEMAND FOR TRIAL BY JURY**

Plaintiff hereby demands a trial by jury.

Dated: April 6, 2021

Respectfully submitted,

By: /s/ Joshua M. Lifshitz

Joshua M. Lifshitz

Email: [jml@jlclasslaw.com](mailto:jml@jlclasslaw.com)

**LIFSHITZ LAW FIRM, P.C.**

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*Attorneys for Plaintiff*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ALEX CICCOTELLI,

Plaintiff,

v.

GENMARK DIAGNOSTICS, INC., KEVIN  
C. O'BOYLE, DARYL J. FAULKNER,  
JAMES FOX, LISA GILES, MICHAEL  
KAGNOFF, ROCHE HOLDINGS, INC., and  
GERONIMO ACQUISITION CORP.,

Defendants.

:  
: Case No. \_\_\_\_\_  
:  
: JURY TRIAL DEMANDED  
:  
: **COMPLAINT FOR VIOLATION OF THE**  
: **SECURITIES EXCHANGE ACT OF 1934**  
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Plaintiff, by his attorneys, for this complaint against defendants, alleges the following upon personal knowledge with respect to himself, and upon information and belief based upon the investigation of counsel as to all other allegations herein:

**NATURE OF ACTION**

1. On March 12, 2021, GenMark Diagnostics, Inc. ("GenMark" or the "Company") entered into an agreement (the "Merger Agreement") to be acquired Roche Holdings, Inc. ("Parent") and Geronimo Acquisition Corp. ("Merger Sub") (together, "Roche") (the "Proposed Merger").
2. Under the terms of the Merger Agreement, Merger Sub commenced a tender offer to purchase all of GenMark's outstanding common stock for \$24.05 per share (the "Tender Offer"), which is set to expire on April 21, 2021.
3. On March 25, 2021, defendants filed a recommendation statement (the "Recommendation Statement") with the U.S. Securities and Exchange Commission (the "SEC").

4. As alleged herein, the Recommendation Statement fails to disclose material information regarding the Proposed Merger, and defendants violated Sections 14(e), 14(d), and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act").

#### **JURISDICTION AND VENUE**

5. This Court has jurisdiction over the claims asserted herein pursuant to Section 27 of the Exchange Act because the claims asserted herein arise under Sections 14(e), 14(d), and 20(a) of the Exchange Act and Rule 14a-9.

6. This Court has jurisdiction over 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.

7. Venue is proper under 28 U.S.C. § 1391(b) because a portion of the transactions and wrongs complained of herein occurred in this District.

#### **THE PARTIES**

8. Plaintiff is and has been continuously throughout all relevant times the owner of GenMark common stock.

9. Defendant GenMark is a Delaware corporation. GenMark's common stock is traded on the NASDAQ under the ticker symbol "GNMK."

10. Defendant Kevin C. O'Boyle is Chairman of the Board of Directors of GenMark (the "Board").

11. Defendant Daryl J. Faulkner is a member of the Board.

12. Defendant James Fox is a member of the Board.

13. Defendant Lisa Giles is a member of the Board.

14. Defendant Michael Kagnoff is a member of the Board.
15. Defendants identified in ¶¶ 10-14 are referred to herein as the “Individual Defendants.”
16. Defendant Parent is a Delaware corporation.
17. Defendant Merger Sub is a Delaware corporation and a wholly-owned subsidiary of Parent.

### **SUBSTANTIVE ALLEGATIONS**

18. The Company is a leading provider of multiplex molecular diagnostic solutions designed to enhance patient care, improve key quality metrics, and reduce the total cost-of-care.

19. On March 12, 2021, GenMark entered into the Merger Agreement, under which GenMark’s stockholders will receive \$24.05 per share.

20. The press release announcing the Proposed Merger provides as follows:

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.

Citi is acting as financial advisor to Roche and Sidley Austin LLP is acting as legal counsel to Roche. J.P. Morgan Securities LLC is acting as exclusive financial advisor to GenMark and DLA Piper LLP is acting as legal counsel to GenMark.

21. On March 25, 2021, defendants filed the Recommendation Statement, which fails to disclose material information regarding the Proposed Merger.

#### Financial Analyses

22. The Recommendation Statement fails to disclose material information regarding the financial analyses performed by J.P. Morgan Securities LLC (“J.P. Morgan”), GenMark’s financial advisor. When a banker’s endorsement of the fairness of a transaction is touted to shareholders, the valuation methods used to arrive at that opinion and the key inputs and range of ultimate values generated by those analyses must be fairly disclosed.

23. The Recommendation Statement fails to disclose the following regarding J.P. Morgan’s Public Trading Multiples analysis: the individual multiples for the companies observed in the analysis.

24. The Recommendation Statement fails to disclose the following regarding J.P. Morgan’s Selected Transaction Analysis: the individual multiples for the transactions observed in the analysis.

25. The Recommendation Statement fails to disclose the following regarding J.P. Morgan’s Discounted Cash Flow Analysis: (i) the unlevered free cash flows used in the analysis and all line items used to calculate unlevered free cash flows; (ii) the terminal values, net cash, and number of fully-diluted outstanding shares used in the analysis; and (iii) the inputs and assumptions underlying the discount rates and perpetuity growth rates.

#### Financial Projections

26. The Recommendation Statement fails to disclose material information regarding GenMark’s financial projections. The disclosure of projected financial information is material because it provides stockholders with a basis to project the future financial performance of a company, and allows stockholders to better understand the financial analyses performed by a company’s financial advisor in support of its fairness opinion.

27. The Recommendation Statement fails to disclose the following regarding GenMark's financial projections: (i) the line items used to calculate EBITDA; (ii) unlevered free cash flows; (iii) the line items used to calculate unlevered free cash flows; (iv) the risk adjustments made to the financial projections; and (v) the non-risk-adjusted financial projections.

Background of the Proposed Merger and Potential Conflicts of Interest

28. The Recommendation Statement fails to disclose material information regarding the background of the Proposed Merger and potential conflicts of interest.

29. The Recommendation Statement fails to disclose whether GenMark entered into any confidentiality agreements that contained standstill or don't ask, don't waive provisions.

30. The Recommendation Statement fails to disclose: (i) whether any of GenMark's officers or directors are continuing their employment following the consummation of the Proposed Merger; (ii) the details of all employment and retention-related discussions and negotiations that occurred between Roche's and GenMark's officers, including who participated in all of the communications; and (iii) whether any of Roche's proposals referenced management retention in the combined company following the Proposed Merger.

31. If disclosed, the omitted information would significantly alter the total mix of information available to GenMark's stockholders.

**COUNT I**

**Claim Against Defendants for Violation of Section 14(e) of the Exchange Act**

32. Plaintiff repeats and realleges the above-referenced allegations as if fully set forth herein.

33. Section 14(e) of the Exchange Act states:

It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading . . . in connection with any tender offer or request or invitation for tenders[.]

34. Defendants disseminated the misleading Recommendation Statement, which contained statements that, in violation of Section 14(e) of the Exchange Act, in light of the circumstances under which they were made, failed to state material facts necessary to make the statements therein not misleading.

35. The Recommendation Statement was prepared, reviewed, and/or disseminated by defendants.

36. The Recommendation Statement misrepresented and/or omitted material facts in connection with the Proposed Merger as set forth above.

37. By virtue of their positions within the Company and/or roles in the process and the preparation of the Recommendation Statement, defendants were aware of this information and their duty to disclose this information in the Recommendation Statement.

38. The omissions in the Recommendation Statement are material in that a reasonable shareholder will consider them important in deciding whether to tender their shares.

39. A reasonable investor will view a full and accurate disclosure as significantly altering the total mix of information made available.

40. Defendants knowingly or with deliberate recklessness omitted the material information identified above in the Recommendation Statement, causing statements therein to be materially incomplete and misleading.

41. Accordingly, defendants violated Section 14(e) of the Exchange Act.

42. Plaintiff is threatened with irreparable harm and has no adequate remedy at law.

**COUNT II**

**Claim Against Defendants for Violation of 14(d) of the Exchange Act**

43. Plaintiff repeats and realleges the above-referenced allegations as if fully set forth herein.

44. Section 14(d)(4) of the Exchange Act states:

Any solicitation or recommendation to the holders of such a security to accept or reject a tender offer or request or invitation for tenders shall be made in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

45. Rule 14d-9(d) states:

Any solicitation or recommendation to holders of a class of securities referred to in section 14(d)(1) of the Act with respect to a tender offer for such securities shall include the name of the person making such solicitation or recommendation and the information required by Items 1 through 8 of Schedule 14D-9 (§ 240.14d-101) or a fair and adequate summary thereof[.]

46. Item 8 requires that directors must “furnish such additional information, if any, as may be necessary to make the required statements, in light of the circumstances under which they are made, not materially misleading.”

47. The Recommendation Statement violates Section 14(d)(4) and Rule 14d-9 because it omits the material facts set forth above, which renders the Recommendation Statement false and/or misleading.

48. Defendants knowingly or with deliberate recklessness omitted the material information set forth above, causing statements therein to be materially incomplete and misleading.

49. The omissions in the Recommendation Statement are material to plaintiff, and he will be deprived of his entitlement to make a fully informed decision with respect to the Proposed Merger if such misrepresentations and omissions are not corrected prior to the expiration of the Tender Offer.

50. Plaintiff has no adequate remedy at law.

### COUNT III

#### **Claim Against the Individual Defendants and Roche for Violation of Section 20(a) of the Exchange Act**

51. Plaintiff repeats and realleges the above-referenced allegations as if fully set forth

herein.

52. The Individual Defendants and Roche acted as controlling persons of GenMark within the meaning of Section 20(a) of the Exchange Act as alleged herein.

53. Due to their positions as directors of GenMark and participation in and/or awareness of the Company's operations and/or intimate knowledge of the false statements contained in the Recommendation Statement filed with the SEC, they had the power to influence and control and did influence and control, directly or indirectly, the decision making of the Company, including the content and dissemination of the various statements that plaintiff contends are false and misleading.

54. Each of the Individual Defendants and Roche was provided with or had unlimited access to copies of the Recommendation Statement alleged by plaintiff to be misleading prior to and/or shortly after these statements were issued and had the ability to prevent the issuance of the statements or cause them to be corrected.

55. Each of the Individual Defendants had direct and supervisory involvement in the day-to-day operations of the Company, and, thus, is presumed to have had the power to control and influence the particular transactions giving rise to the violations as alleged herein, and exercised the same.

56. The Recommendation Statement contains the unanimous recommendation of the Individual Defendants to approve the Proposed Merger. They were thus directly connected with and involved in the making of the Recommendation Statement.

57. Roche had direct supervisory control over the composition of the Recommendation Statement and the information disclosed therein, as well as the information that was omitted and/or misrepresented in the Recommendation Statement.

58. Accordingly, the Individual Defendants and Roche violated Section 20(a) of the Exchange Act.

59. The Individual Defendants and Roche had the ability to exercise control over and did control a person or persons who have each violated Section 14(e) of the Exchange Act and Rule 14a-9, by their acts and omissions as alleged herein.

60. Due to their positions as controlling persons, these defendants are liable pursuant to Section 20(a) of the Exchange Act.

61. Plaintiff is threatened with irreparable harm and has no adequate remedy at law.

#### **PRAYER FOR RELIEF**

WHEREFORE, plaintiff prays for judgment and relief against defendants as follows:

A. Enjoining defendants and all persons acting in concert with them from proceeding with, consummating, or closing the Proposed Merger;

B. In the event defendants consummate the Proposed Merger, rescinding it and setting it aside or awarding rescissory damages;

C. Directing the Individual Defendants to file a Recommendation Statement that does not contain any untrue statements of material fact and that states all material facts required in it or necessary to make the statements contained therein not misleading;

- D. Declaring that defendants violated Sections 14(e), 14(d), and 20(a) of the Exchange Act and Rule 14a-9;
- E. Awarding plaintiff the costs of this action, including reasonable allowance for attorneys' and experts' fees; and
- F. Granting such other and further relief as this Court may deem just and proper.

**JURY DEMAND**

Plaintiff hereby demands a trial by jury.

Dated: April 6, 2021

**GRABAR LAW OFFICE**

By: /s/ Joshua H. Grabar

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