UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

TIANDONG TANG, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. EASTMAN KODAK COMPANY, JAMES V. CONTINENZA, AND DAVID BULLWINKLE, Defendants.	Case No. 3:20-cv-10462-FLW-ZNQ CLASS ACTION

MEMORANDUM IN SUPPORT OF BROWARD MOTORSPORTS HOLDINGS LLC'S MOTION FOR APPOINTMENT AS LEAD PLAINTIFF AND APPROVAL OF SELECTION OF LEAD COUNSEL

Motion Day: November 16, 2020

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Movant Broward Motorsports Holdings LLC ("Broward" or "Movant") respectfully submits this Memorandum of Law in support of its motion, pursuant to Section 21D(a)(3) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78u-4(a)(3), as amended by the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), for an Order: (1) appointing Broward as the Lead Plaintiff on behalf of all persons who purchased securities of Eastman Kodak Company ("Kodak") during the Class Period, as described below; (2) approving Lead Plaintiff's selection of the law firms of Schubert Jonckheer & Kolbe LLP ("Schubert Firm") and Shapiro Haber & Urmy LLP ("Shapiro Firm") as Co-Lead Counsel for the Class and Lowey Dannenberg P.C. ("Lowey") as Local Counsel; and (3) granting such other relief as the Court may deem just and proper.

PRELIMINARY STATEMENT

This is a class action lawsuit commenced on behalf of a Class seeking to recover damages for violations of the federal securities laws by Defendants Kodak, James V. Continenza ("Continenza") and David Bullwinkle ("Bullwinkle") under §§ 10(b) and 20(a) of the Exchange Act and Rule 10b-5 promulgated thereunder.

Pursuant to the PSLRA, the court must appoint as lead plaintiff the movant who possesses the largest financial interest in the outcome of the action and who satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). Broward has the largest financial interest in the relief

sought in this action, as illustrated below. Broward further satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure because it is an adequate representative with claims typical of the other members of the Class. Accordingly, Broward respectfully submits that it should be appointed Lead Plaintiff, and that its selection of experienced class action counsel, the Schubert Firm and Shapiro Firm, as Co-Lead Counsel for the Class, and Lowey as Local Counsel should be approved.

STATEMENT OF THE FACTS

Kodak provides hardware, software, consumables, and services to customers in the commercial print, packaging, publishing, manufacturing, and entertainment sectors. On July 27, 2020, Kodak issued a statement to various local media outlets in Rochester, New York (where it is headquartered) on the imminent public announcement of a "new manufacturing initiative" involving the U.S. International Development Finance Corporation ("IDFC").

On that same day, Kodak granted Defendant Continenza, its Chief Executive Officer and Executive Chairman, 1.75 million stock options at a strike price of between $3.03 and $12 per share. Additionally, the Company awarded 45,000 stock options to its Chief Financial Officer, Defendant Bullwinkle. On the day these options were awarded, Kodak's stock price closed at $2.62 per share, well below the lowest strike price, meaning these options were "out of the money" when they were awarded.

The next day, July 28, 2020, the price of Kodak's stock soared 200% following news that the Company had won a $765 million government loan from the IDFC under the Defense Production Act ("DPA") to produce pharmaceutical materials, including ingredients for COVID-19 drugs. Kodak's shares continued to surge by over 300% the following day to close at $33.20 per share on July 29, 2020. This massive increase caused the options granted to Defendants Continenza and Bullwinkle just days before to rocket "into the money." Indeed, Defendant Continenza alone saw the value of his options go from zero to $50 million in just 48 hours.

On August 4, 2020, before the market opened, an article published on *CQ Roll Call* reported that U.S. Senator Elizabeth Warren sent a letter to the U.S. Securities and Exchange Commission ("SEC") requesting an investigation of Kodak. The letter noted suspicious purchases of stock by insiders "made while the company was involved in secret negotiations with the government over a lucrative contract" that raised "questions about whether these executives potentially made investment decisions based on material, non-public information derived from their positions," in violation of the federal securities laws. Additionally, the letter pointed to the Company's initial July 27, 2020 announcement of the loan to certain local media outlets, followed by a subsequent frenzy in trading on July 28—a one-day volume of over 1.6 million shares, compared to volume of only 75,000 shares on the previous

trading day—as cause for investigation.

According to an article published in the *Wall Street Journal* on August 4, 2020, the SEC promptly commenced an investigation into "how Kodak controlled disclosure of the loan, word of which began to emerge on July 27, 2020." The article further stated that "[t]he SEC is also expected to examine the stock options granted to executives on July 27," which "instantly became profitable" when Kodak's government loan was announced.

On August 5, 2020, several Congressional committees sent a joint letter to Defendant Continenza seeking documents about the loan, stock options, and IDFC's "decision to award this loan to Kodak despite your company's lack of pharmaceutical experience and the windfall gained by you and other company executives as a result of this loan" which raised "questions that must be thoroughly examined." The committees also sent a document request to IDFC on the same day. That letter noted that Kodak was "an organization that was on the brink of failure in 2012 and was unsuccessful in its previous foray into pharmaceutical manufacturing."

In response to increasing public and regulatory scrutiny of Kodak, the IDFC suspended the loan. On August 7, 2020, after the market closed, the IDFC announced that "recent allegations of wrongdoing raise serious concerns. We will not proceed any further unless these allegations are cleared." On this news, the Kodak's stock

price declined $4.15, or 28%, from $14.88 per share on August 7, 2020, to $10.73 per share on August 10, 2020, followed by further declines.

In the *Tang* complaint, the plaintiff alleges that the Defendants knowingly or recklessly misrepresented material facts and/or omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, causing massive losses to investors when the truth emerged. The Class Period alleged in the *Tang* complaint is July 27, 2020 through August 7, 2020.

A substantially similar securities class action was later filed in the U.S. District Court for the Southern District of New York, captioned *McAdams et al. v. Eastman Kodak Company, et al.*, No. 1:20-cv-6861-JGK (S.D.N.Y.) (filed August 26, 2020). The Class Period alleged in the *McAdams* complaint is four days longer, July 27, 2020 through August 11, 2020. The *McAdams* complaint is annexed as Exhibit A to the accompanying Declaration of Anthony M. Christina ("Christina Decl."). Movant Broward is filing its motion for appointment as lead plaintiff in both this Action and in the *McAdams* Action.

ARGUMENT

Broward respectfully submits that it should be appointed Lead Plaintiff for the Class because it is the movant "most capable of adequately representing the interests of class members." 15 U.S.C. § 78u-4(a)(3)(B). The PSLRA establishes a

presumption that the "most adequate plaintiff" is the movant that "has the largest financial interest in the relief sought by the class" and "otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure." *Id*.

A. THE EXCHANGE ACT PROVIDES THAT A LEAD PLAINTIFF BE APPOINTED FOR CLAIMS BROUGHT AS A CLASS ACTION

Section 21D(a)(3)(A)(i) of the Exchange Act provides that, within 20 days after the date on which a class action is filed:

> the plaintiff or plaintiffs shall cause to be published, in a widely circulated national business-oriented publication or wire service, a notice advising members of the purported plaintiff class -- (I) of the pendency of action, the claims asserted therein, and the purported class period; and (II) that, not later than 60 days after the date on which the notice is published, any member of the purported class may move the court to serve as lead plaintiff of the purported class.

15 U.S.C. § 78u-4(a)(3)(A)(i).

The first filed instant action was filed by Plaintiff Tang on August 13, 2020. On or about August 14, 2020, a public notice was published by Tang's counsel concerning the filing of this class action lawsuit on behalf of purchasers. Christina Decl., Ex. B. The notice advised members of the Class of the pendency of the action, the claims asserted, the Class Period, and that anyone who wished to serve as lead plaintiff needed to make a motion to the Court no later than 60 days from the date of the notice. As a result, the notice satisfied all the requirements of the PSLRA.

Section 21D(a)(3)(B) of the Exchange Act directs the Court to consider any motions to serve as lead plaintiffs in response to any such notice by the later of (i) 90 days after the date of publication, or (ii) as soon as practicable after the court decides any pending motion to consolidate any actions asserting substantially the same claim or claims, and to presume that the "most adequate plaintiff" to serve as lead plaintiff is the person or group of persons who:

> (aa) has either filed the complaint or made a motion in the response to a notice . . .;
>
> (bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and
>
> (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

15 U.S.C. § 78u-4(a)(3)(B).

That presumption may be rebutted where the otherwise presumptively most adequate plaintiff:

> (aa) will not fairly and adequately protect the interests of the class; or
>
> (bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class.

15 U.S.C. § 78u-4(a)(3)(B)(iii)(II). The PSLRA also provides that the "most adequate plaintiff shall, subject to the approval of the Court, select and retain counsel to represent the class." 15 U.S.C. § 78u-4(a)(3)(B)(v).

B. BROWARD SHOULD BE APPOINTED LEAD PLAINTIFF

1. Broward Timely Filed a Lead Plaintiff Motion

The first requirement to being appointed a lead plaintiff is to have "either filed the complaint or made a motion in response to a notice . . . ." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(aa). Here, Broward timely filed the instant motion for appointment as Lead Plaintiff, and therefore Broward satisfies the first prong of the lead plaintiff test.

2. Broward Has the Requisite Largest Financial Interest in the Relief Sought by The Class

The second prerequisite to being appointed a lead plaintiff is that "in the determination of the Court, [the plaintiff] has the largest financial interest in the relief sought by the Class" of those persons moving to be appointed lead plaintiff. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb). To the best of its knowledge, Broward has the largest financial interest of any Kodak investor seeking to serve as Lead Plaintiff.

For claims arising under federal securities laws, courts frequently assess financial interest based upon the four factors articulated in *Lax v. First Merchants Acceptance Corp.*: (1) the number of shares purchased during the class period; (2) the number of net shares purchased during the class period; (3) the total net funds expended during the class period; and (4) the approximate losses suffered. No. 97 C 2715, 1997 U.S. Dist. LEXIS 12432, at *18 (N.D. Ill. Aug. 6, 1997). The *Lax*

factors have been adopted and routinely applied. *See, e.g.*, *Chahal v. Credit Suisse Grp. AG*, No. 18-CV-2268 (AT) (SN), 2018 U.S. Dist. LEXIS 104185, at *6 (S.D.N.Y. June 21, 2018); *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr. v. LaBranche & Co.*, 229 F.R.D. 395, 404-05 (S.D.N.Y. 2004). *See also In re Cendant Corp. Litig.*, 264 F.3d 201, 262 (3d Cir. 2001); *Rubenstahl v. Philip Morris Int'l Inc.*, 2019 U.S. Dist. LEXIS 23309, at *5 (D.N.J. Feb. 13, 2019) (endorsing *Lax* factors).

With respect to the final *Lax* factor, the amount of claimed losses, it is well settled that where, as here, complaints are filed alleging different class periods, in computing the largest financial interest of competing movants, courts generally utilize "the longer, more inclusive class period" because it "encompasses more potential class members and damages." *See, e.g. Hom v. Vale, S.A.*, No. 15-cv-9539-GHW, 2016 U.S. Dist. LEXIS 28863, at *13 (S.D.N.Y. Mar. 7, 2016); *In re Doral Fin. Corp. Sec. Litig.*, 414 F. Supp. 2d 398, 402-03 (S.D.N.Y. 2003). While the Class Periods in *Tang* and *McAdams* both begin on July 27, 2020, the *McAdams* Class Period is longer, ending on August 11, 2020.

As set forth in its certification, Broward purchased 10,000 shares of Kodak stock on July 30, 2020 at $28.00 per share, expending $280,000.00. Christina Decl., Ex. C. Broward held all of those shares during the Class Period and continues to hold all of those shares. For purposes of this motion, Broward's losses are calculated based upon the PSLRA's "look-back" provision, which provides a benchmark for

damages as "the mean trading price of that security during the 90-day period beginning on the date on which the information correcting the misstatement or omission that is the basis for the action is disseminated to the market." 15 U.S.C.A. § 78u-4(e)(1). The "look-back" provision is an appropriate measure for calculating movant losses at the lead plaintiff stage. *See Sallustro v. Cannavest Corp.*, 93 F. Supp. 3d 265, 275 (S.D.N.Y. 2015).

First, the value of Broward's held shares is calculated as the average closing share price since the end of the *McAdams* Class Period to the filing of the Lead Plaintiff motion – an interval of 63 days (August 12, 2020 through October 13, 2020). The average closing price of Kodak stock during this interval was $8.06 per share.

Second, that price times Broward's 10,000 shares produces a residual value of $80,600.00, which subtracted from the $280,000 acquisition cost reflects a loss of **$199,400.00**. Broward's loss will be updated after the 90 day period ends to reflect the average closing price for the entire 90 day "look-back" period. *See* Christina Decl., Ex. D.

Broward believes it has the largest financial interest in the recovery sought in this litigation compare to the interest of any other investor seeking appointment as Lead Plaintiff. Accordingly, pursuant to the PSLRA, Broward is presumed to be the

"most adequate" lead plaintiff and should be appointed as lead plaintiff. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb).

3. Broward Otherwise Satisfies Rule 23

The lead plaintiff must also "otherwise satisf[y] the requirements of Rule 23 of the Federal Rules of Civil Procedure." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(cc). *See In re Cendant Corp. Litig.*, 264 F.3d at 263. Rule 23(a) provides that a party may serve as a class representative only if the following four requirements are satisfied:

> (1) the class is so numerous the joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

Of the four prerequisites to class certification, only two – typicality and adequacy – directly address the personal characteristics of the class representative. Consequently, in deciding a motion to serve as lead plaintiff, the Court should limit its inquiry to the typicality and adequacy prongs of Rule 23(a) and defer examination of the remaining requirements until the lead plaintiff moves for class certification. *See City of Monroe Employees' Ret. Sys. v. Hartford Fin. Svcs. Group*, *Inc.,* 269 F.R.D. 291, 296 (S.D.N.Y. 2010). As detailed below, Broward satisfies both the

typicality and adequacy requirements of Rule 23, thereby justifying its appointment as Lead Plaintiff.

Under Rule 23(a)(3), the claims or defenses of the representative party must be typical of those of the class. Broward satisfies this requirement because its claims arise from the very same course of conduct as the claims of the other members of the Class. Broward and the other members of the Class purchased Kodak stock at prices allegedly artificially inflated by defendants' materially false and misleading statements and/or omissions relating to Kodak's IDFC loan. Broward and other investors also sustained losses when Kodak's misconduct in connection with the IDFC loan was revealed to the market. Thus, Broward's claims are typical of those of the other members of the Class because its claims and the claims of other Class members arise out of the same course of events based on the same legal theory. *See In re Merck & Co., Inc. Sec. Litig.*, MDL No. 1658 (SRC), 2013 U.S. Dist. LEXIS 13511, at *40 (D.N.J. Jan. 30, 2013).

Rule 23(a)(4) provides that the representative party must "fairly and adequately protect the interests of the class." The adequacy requirement is satisfied where: (1) class counsel is qualified, experienced, and generally able to conduct the litigation; (2) there is no conflict between the proposed lead plaintiff and the members of the class; and (3) the proposed lead plaintiff has a sufficient interest in the outcome of the case to ensure vigorous advocacy. *See In re Pharmaprint, Inc.*

Sec. Litig., No. 00-cv-00061, 2002 U.S. Dist. LEXIS 19845, at *17 (D.N.J. Apr. 17, 2002).

Here, Broward has no conflicts with the interests of the members of the Class. Broward wants to obtain the maximum recovery for the Class so as to maximize its *pro rata* share of that recovery. Broward and its counsel have already demonstrated that they will prosecute the claims of the Class vigorously by having prepared a certification and filing this motion. In addition, as further addressed below, Broward's proposed counsel are highly qualified, experienced and able to conduct this complex litigation vigorously and in a professional manner. Thus, Broward satisfies the adequacy requirements of Rule 23.

Accordingly, Broward satisfies the requirements of Section 21D(a)(3)(B) and is presumptively the most adequate plaintiff. Unless this presumption is rebutted, Broward should be appointed Lead Plaintiff.

D. THE COURT SHOULD APPROVE BROWARD'S CHOICE OF COUNSEL

The Exchange Act provides that the lead plaintiff shall, subject to Court approval, select and retain counsel to represent the class. *See* 15 U.S.C. § 78u-4(a)(3)(B)(v). In that regard, Broward has selected and retained the Schubert Firm and the Shapiro Firm to serve as Co-Lead Counsel and Lowey as Local Counsel. As reflected by their firm resumes, attached to the Christina Declaration as Exhibits E through G, the Schubert Firm, the Shapiro Firm and Lowey have extensive

experience prosecuting class actions, including securities fraud class actions The Court may be assured that if the Court approves Broward's selection of counsel, the members of the class will receive the highest caliber of legal representation from experienced and resourceful counsel. Accordingly, the Court should approve Movant's selection of the Schubert Firm and the Shapiro Firm as Co-Lead Counsel and Lowey as Local Counsel.

CONCLUSION

In light of the foregoing, Broward respectfully requests that the Court: (i) appoint Broward as Lead Plaintiff, (ii) approve Broward's selection of the Schubert Firm and the Shapiro Firm as Co-Lead Counsel and Lowey as Local Counsel; and (iii) grant such other relief as the Court may deem just and proper.

Dated: October 13, 2020

Respectfully submitted,

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