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**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.

No. 3:20-cv-10462
Hon. Freda L. Wolfson

CLASS ACTION

MOTION DAY: November 16, 2020

ORAL ARGUMENT REQUESTED

**MEMORANDUM OF LAW IN SUPPORT OF THE MOTION OF ALEXANDER
ENCISO FOR APPOINTMENT AS LEAD PLAINTIFF AND
APPROVAL OF HIS SELECTION OF LEAD COUNSEL**

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Alexander Enciso (“Enciso”) respectfully submits this memorandum of law in support of his motion: (1) to be appointed Lead Plaintiff pursuant to Section 21D(a)(3)(B) of the Securities Exchange Act of 1934 (the “Exchange Act”), 15 U.S.C. § 78u-4(a)(3)(B), as amended by the Private Securities Litigation Reform Act of 1995 (the “PSLRA”); (2) for approval of his selection of Gibbs Law Group LLP (“Gibbs Law Group”) as Lead Counsel for the Class; and (3) for any such further relief as the Court may deem just and proper.

PRELIMINARY STATEMENT

There are at least two related securities class actions pending against Eastman Kodak Company (“Kodak” or the “Company”) and certain of its senior officers (collectively, “Defendants”).¹ The actions allege that Defendants defrauded investors in violation of Sections 10(b) and 20(a) of the Exchange Act (15 U.S.C. §§ 78j(b), 78t(a)), and U.S. Securities and Exchange Commission (“SEC”) Rule 10b-5 promulgated thereunder (17 C.F.R. § 240.10b-5). Specifically, the actions allege that from July 27, 2020, to August 11, 2020 (the “Class Period”), Defendants misrepresented the likelihood that the U.S. International Development Finance Corporation (“DFC”) would grant Kodak a \$765 million loan to produce pharmaceutical materials (including ingredients for COVID-19 drugs), and manipulated the timing of the disclosure of the loan, so that executives could reap millions from stock options.²

¹ In addition to the above captioned action, two Kodak investors filed an action in the Southern District of New York on August 26, 2020. *See McAdams v. Eastman Kodak Company*, No. 1:20-cv-06861 (S.D.N.Y.) (“*McAdams*”). Enciso has simultaneously filed a motion seeking Lead Plaintiff appointment in *McAdams*.

² While the actions assert different class periods, for purposes of appointing a Lead Plaintiff, the broadest potential class period governs. *See Stires v. Eco Science Solutions, Inc.*, 2018 WL 5784817, at *1, n. 2 (D.N.J. Feb. 14, 2018).

Pursuant to the PSLRA, this Court is to appoint the “most adequate plaintiff” to serve as Lead Plaintiff. 15 U.S.C. § 78u-4(a)(3)(B)(i). In that regard, the Court is required to determine which movant has the “largest financial interest” in the relief sought by the Class in this litigation, and also whether such movant has made a *prima facie* showing that it is a typical and adequate class representative under Rule 23 of the Federal Rules of Civil Procedure. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I).

For the reasons set forth below, Enciso is the “most adequate plaintiff” by virtue of, among other things, the \$228,671.51 in losses as calculated on a first-in, first-out (“FIFO”) basis and a last-in, first-out (“LIFO”) basis that he incurred on his investments in Kodak securities during the Class Period. Enciso also satisfies the relevant requirements of Rule 23 of the Federal Rules of Civil Procedure because his claims are typical of all members of the Class and he will fairly and adequately represent the Class. Indeed, Enciso fully understands the Lead Plaintiff’s obligations to the Class under the PSLRA and is willing and able to undertake the responsibilities entailed in acting as Lead Plaintiff to guarantee vigorous prosecution of this action. *See* Declaration of Eric T. Kanefsky (“Kanefsky Decl.”), Ex. A.

Further, Enciso has selected Gibbs Law Group, a law firm with substantial experience in successfully prosecuting securities class actions, to serve as Lead Counsel for the Class. Accordingly, Enciso respectfully requests that the Court appoint him Lead Plaintiff and otherwise grant his motion.

FACTUAL BACKGROUND

Kodak is best known for its historic involvement in the photography industry but has been in a period of protracted decline with the advent of digital photography. ¶25.³ On May 14, 2020,

³ All citations to ¶__ refer to the Complaint (ECF No. 1) unless otherwise indicated.

President Trump signed an Executive Order authorizing the DFC to make loans to companies to support the nation’s response to the COVID-19 outbreak. ¶26. On July 27, 2020, a limited number of media outlets in Rochester, where Kodak is headquartered, reported that the Company would launch a “new manufacturing initiative that could change the course of history for Rochester and the American People.” ¶¶2, 27. This news caused Kodak’s trading volume and share price to increase on July 27, 2020. ¶28.

The next day, on July 28, 2020, Kodak and the DFC issued a joint statement officially announcing that the DFC had selected Kodak to receive a \$765 million loan to manufacture ingredients used in the production of COVID-19 drugs. *McAdams*, ECF No. 1 ¶¶6, 37, 38. On July 29, 2020, Kodak’s CEO, Defendant James Continenza, appeared on CNBC and told investors that the loan was a “done deal,” stating, “[w]e feel very comfortable that we can bank on it . . . We’ve been working on this for a few months.” ¶33. In response to a question about the spike in trading volume on July 27, and whether word of the deal had gotten out prior to the official announcement, Continenza replied, “this has been a pretty tight kept secret . . . I couldn’t tell you what influenced [the volume] or didn’t.” *Id.* Kodak’s stock continued to spike on the news. Between July 27 and July 29, 2020 Kodak’s stock price shot up \$30.58 per share, a more than 1,000% increase, from \$2.62 per share on July 27, 2020 to \$33.20 per share on July 29, 2020. ¶35.

However, the loan was anything but a “done deal” and was not a “pretty tight kept secret” as illustrated by news reports explaining that Defendants manipulated the timing of the disclosure of the loan to enrich themselves. *McAdams*, ECF No. 1 ¶43. On July 29, 2020, the *Wall Street Journal* reported that the Company had leaked news of the loan to the Rochester outlets that first reported on it, then surreptitiously attempted to retract the stories, and that it was those reports that caused the spike in Kodak trading volume and share price on July 27. *Id.* at ¶43. This news caused

the price of Kodak stock to decline \$3.37 per share, or 10%, from \$33.20 per share on July 29, 2020, to \$29.83 per share on July 30, 2020. *Id.* at ¶44.

Then, over the August 1-2, 2020 weekend, *Reuters* reported details of Kodak's secret and "unusual" stock option grants to Continenza immediately prior to the announcement of the DFC loan. ¶37. According to *Reuters*, Kodak secretly granted Continenza 1.75 million stock options as the result of "an understanding" between Continenza and Kodak's Board "that had previously neither been listed in his employment contract nor made public" and the decision to grant the options was not "formalized or made into a binding agreement, which is why it was not disclosed previously." *Id.* The value of these concealed stock options spiked to \$50 million after the announcement of the loan. ¶35. Kodak also granted thousands of additional stock options to other executives, and at the same time, executives loaded-up on Kodak stock and options immediately prior to the announcement of the DFC loan, the value of which also spiked by millions. ¶¶3, 7, 34-35. The *Reuters* report caused Kodak's stock price to fall \$6.91 per share, more than 34%, to close at \$14.94 on August 3, 2020. ¶38.

The next day, on August 4, 2020, Senator Elizabeth Warren submitted a letter to the SEC requesting that the regulator investigate Kodak for violations of securities laws related to the loan disclosure and insider trading, and the *Wall Street Journal* reported that the SEC had commenced an investigation. ¶¶39-41. On this news, Kodak stock fell \$0.54 per share, more than 3%, to close at \$14.40 per share on August 4, 2020. *McAdams*, ECF No. 1 ¶49.

On August 7, 2020, Kodak announced it was conducting an internal review of the Company's disclosure of the loan. *Id.* at ¶50. On this news, Kodak stock fell \$1.23 per share, more than 7%, to close at \$14.88 per share on August 7, 2020. *Id.* at ¶51. Then, on August 7, 2020, the DFC tweeted: "On July 28 we signed a Letter of Interest with Eastman Kodak. Recent

allegations of wrongdoing raise serious concerns. We will not proceed any further unless these allegations are cleared.” *Id.* at ¶52. This news caused Kodak stock to fall by \$4.15 per share, nearly 28%, to close at \$10.73 per share on August 10, 2020. *Id.* at ¶54.

Finally, on August 11, 2020, during an investor conference call, Continenza stated “we ... support the DFC’s decision to wait [sic] clarification before moving forward with the loan process,” and referred to the loan as the “potential loan,” in sharp contrast to his previous assertion that Kodak could “bank on” the loan. *Id.* at ¶57. On this news, Kodak’s stock fell \$0.29 per share, nearly 3%, to close at \$9.72 per share on August 12, 2020. *Id.* at ¶58.

ARGUMENT

Under the PSLRA, any Class member may move for appointment as Lead Plaintiff within 60 days of the publication of notice that the first action asserting substantially the same claims has been filed. *See* 15 U.S.C. § 78u-4(a)(3)(A). On August 13, 2020, Plaintiff Tiandong Tang (“Tang”) filed this case, alleging that Defendants defrauded investors during the period of July 27, 2020, to August 7, 2020. ECF No. 1 at ¶1. The next day, on August 14, 2020, counsel for Tang published a notice on *Globe Newswire*, which alerted investors to the pendency of the action and set the deadline to seek Lead Plaintiff status by October 13, 2020. *See* Kanefsky Decl. Ex. B.

On August 26, 2020, Plaintiffs Jimmie and Judy McAdams filed a substantially similar action against Kodak in the Southern District of New York which expanded the end of the Class Period from August 7, 2020 to August 11, 2020. *See McAdams*, ECF No. 1 at ¶1. Also on August 26, 2020, counsel for the McAdamses published a notice on *PR Newswire* alerting investors to the expanded Class Period, and reminding them of the deadline on October 13, 2020 to seek to serve as Lead Plaintiff. *See* Kanefsky Decl. Ex. C. Accordingly, Enciso satisfies the PSLRA 60-day requirement through the filing of this motion.

I. ENCISO SHOULD BE APPOINTED LEAD PLAINTIFF

Enciso respectfully submits that he should be appointed Lead Plaintiff because he is the movant “most capable of adequately representing the interests of class members.” 15 U.S.C. § 78u-4(a)(3)(B). When selecting a Lead Plaintiff, 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.” 15 U.S.C. § 78u-4(a)(3)(B).

A. Enciso Believes He Has The Largest Financial Interest In The Relief Sought By The Class

Enciso believes that he has the largest financial interest in the relief sought by the Class and thus moves to be appointed Lead Plaintiff. 15 U.S.C. § 78u-4(a)(3)(B)(iii). Enciso incurred total losses of \$228,671.51 FIFO/LIFO from his investments in Kodak securities during the Class Period. To the best of Enciso’s knowledge, there is no other applicant seeking Lead Plaintiff appointment that has a larger financial interest in this litigation.⁴ Accordingly, Enciso believes he has the largest financial interest of any qualified movant seeking Lead Plaintiff status, and is the presumptive “most adequate plaintiff.” 15 U.S.C. § 78u-4(a)(3)(B)(iii).

B. Enciso Satisfies The Requirements Of Rule 23

In addition to possessing the largest financial interest in the outcome of the litigation, Enciso otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure. 15

⁴ Enciso’s PSLRA-required Certification is provided as Exhibit A to the Kanefsky Decl. In addition, a chart setting forth calculations of Enciso’s financial interest is provided as Exhibit D to the Kanefsky Decl. When assessing financial interest, Courts in this District have considered, the following factors, among others, consistent with the Third Circuit’s decision in *In re Cendant Corporation Litigation*, 264 F.3d 201 (3d Cir. 2002): “(1) the number of shares that the movant purchased during the putative class period; (2) the total net funds expended by the plaintiffs during the class period; and (3) the approximate losses suffered by the plaintiffs.” *Lewis v. Lipocine*, 2016 WL 7042075, at *4 (D.N.J. Dec. 2, 2016). Enciso’s PSLRA certification and loss calculation provide all the trading information necessary to calculate his financial interest under all possible metrics and Enciso does not presuppose that there is only one valid methodology.

U.S.C. § 78u-4(a)(3)(B)(iii)(I)(cc). On a motion to serve as Lead Plaintiff, the movant need only make a “*prima facie*” showing that it satisfies Rule 23’s typicality and adequacy requirements. *Lipocine*, 2016 WL 7042075, at *4; *see also Kanefsky v. Honeywell Int’l Inc.*, 2019 WL 936662, at *2 (D.N.J. Feb. 26, 2019) (“To satisfy the requirements of Rule 23, a prospective lead plaintiff need only make an initial showing of typicality and adequacy.”). Here, Enciso clearly satisfies both requirements.

Enciso’s claims are typical of the claims of other purchasers of Kodak securities. Typicality can be established by showing that the proposed class representative’s individual circumstances are not “markedly different from those of the putative class and that the legal theory upon which [their] claims are based does not differ from that upon which the claims of other class members will perforce be based.” *Lipocine*, 2016 WL 7042075, at *4 (internal quotations omitted). Here, Enciso’s individual circumstances and legal claims are substantively identical to the individual circumstances and legal claims of the other Class members. Like all other Class members, Enciso: (1) purchased Kodak securities during the Class Period; (2) at prices allegedly artificially inflated by Defendants’ materially false and misleading statements and/or omissions; and (3) was damaged thereby. *See Bucks Cnty. Emps. Ret. Fund v. Newell Brands, Inc.*, 2018 WL 4629571, at *2 (D.N.J. Sep. 27, 2018) (typicality satisfied when lead plaintiff movant “like other members of the proposed class, seeks to recover the losses it allegedly incurred as a result of Defendants’ misrepresentations and omissions”). As such, Enciso is a typical Class representative.

Enciso likewise satisfies the adequacy requirement of Rule 23. Under Rule 23(a)(4) of the Federal Rules of Civil Procedure, the representative party must “fairly and adequately protect the interests of the Class.” For the Class’ interests to be fairly and adequately represented, a Lead Plaintiff movant must demonstrate that it “has the ability and incentive to represent the claims of

the class vigorously, whether [it] has obtained adequate counsel, and whether there is a conflict between the movant's claims and those asserted on behalf of the class." *Lipocine*, 2016 WL 7042075, at *4. Enciso satisfies these elements because his substantial financial stake in the litigation provides the ability and incentive to vigorously represent the Class' claims. Indeed, Enciso's interests are perfectly aligned with those of the other Class members and are not antagonistic in any way. There are no facts to suggest any actual or potential conflict of interest or other antagonism between Enciso and other Class members.

Indeed, Enciso is committed to discharge his obligations as a Lead Plaintiff under the PSLRA to oversee and supervise the litigation separate and apart from counsel and submitted a sworn certification as to his willingness and ability to fulfill those duties. *See Kanefsky Decl., Ex. A.* What's more, Enciso has submitted a supplemental Declaration providing the Court with additional information supporting his *bona fides*, including explaining who he is, a former marine who received an honorable discharge, that he is an experienced investor, and given his substantial financial interest in the litigation, that he intends to continue to actively oversee counsel, confer with counsel regarding litigation strategy, attend important court proceedings, hearings, and depositions, and review and authorize the filing of important litigation documents. *See Kanefsky Decl., Ex. E (Declaration of Alexander Enciso).*

Finally, Enciso has demonstrated his adequacy through his selection of Gibbs Law Group as proposed Lead Counsel to represent the Class in this action. As discussed more fully below, Gibbs Law Group is highly qualified and experienced in the area of securities class action litigation and has repeatedly demonstrated an ability to conduct complex securities class action litigation effectively.

II. THE COURT SHOULD APPROVE ENCISO'S SELECTION OF LEAD COUNSEL

The Court should approve Enciso's selection of Gibbs Law Group as Lead Counsel on behalf of the Class. Pursuant to 15 U.S.C. § 78u-4(a)(3)(B)(v), a movant shall, subject to Court approval, select and retain counsel to represent the class it seeks to represent, and that choice is not to be disturbed unless it is necessary to "protect the interests of the class." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II)(aa).

Gibbs Law Group is highly experienced in prosecuting complex litigation generally and securities and other financial litigation in particular. Indeed, the firm and its lawyers have developed a reputation for excellence among courts nationwide and have achieved highly favorable resolutions in securities and other financial fraud class actions. *See* Gibbs Law Group Firm Resume, attached as Ex. F to the Kanefsky Decl. (listing the firm's relevant experience including in *In re Peregrine Fin. Group Customer Litig.*, No. 12-cv-5546 (N.D. Ill.) (resolutions delivered more than \$75 million to investors); *In re Chase Bank USA, N.A. "Check Loan" Contract Litigation*, No. 09-2032 (N.D. Cal.) (recovered \$100 million); *Roth v. Aon Corp.*, No. 04-cv-06835 (N.D. Ill.) (\$30 million); and *Deora v. NantHealth*, No. 2:17-cv-1825 (C.D. Cal.) (\$16.5 million)).

Thus, the Court may be assured that by granting this motion, the Class will receive the highest caliber of legal representation. Accordingly, the Court should approve Enciso's selection of Gibbs Law Group as Lead Counsel for the Class.

CONCLUSION

Enciso respectfully requests that the Court: (1) appoint him to serve as Lead Plaintiff pursuant to Section 21D(a)(3)(B) of the Exchange Act, 15 U.S.C. § 78u-4(a)(3)(B); (2) approve his selection of Gibbs Law Group as Lead Counsel for the Class; and (3) grant such other relief as the Court may deem just and proper.

DATED: October 13, 2020

/s/ Eric T. Kanefsky

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of October 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing to the registered participants as identified on the Notice of Electronic Filing.

/s/ Eric T. Kanefsky

Eric T. Kanefsky