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**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

TIANDONG TANG, Individually and On
Behalf of All Others Similarly Situated,

Plaintiff,

vs.

EASTMAN KODAK COMPANY, JAMES
V. CONTINENZA, AND DAVID
BULLWINKLE,

Defendants.

No.: 3:20-CV-10462-FLW-ZNQ

**MEMORANDUM OF LAW IN
SUPPORT OF MOTION OF JOHN
MCMULLAN TO APPOINT LEAD
PLAINTIFF AND APPROVE LEAD
PLAINTIFF'S SELECTION OF
COUNSEL**

CLASS ACTION

Motion Date: November 16, 2020

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Movant John McMullan (“Movant”) respectfully submits this memorandum of law in support of his motion for an Order, pursuant to Section 21D(a)(3)(B) of the Securities Exchange Act of 1934 (the “Exchange Act”), as amended by the Private Securities Litigation Reform Act of 1995 (“PSLRA”), 15 U.S.C. § 78u-4(a)(3)(B):

(a) appointing Movant as Lead Plaintiff for the Class consisting of all persons or entities who purchased or otherwise acquired publicly traded securities of Eastman Kodak Company (“Kodak” or the “Company”) between July 27, 2020 and August 11, 2020, both dates inclusive (the “Class Period”)¹; and

(b) approving Movant’s selection of The Rosen Law Firm P.A. (“Rosen

¹ On August 26, 2020, a case was filed in the United States District Court for the Southern District of New York styled as *McAdams, et al. v. Eastman Kodak Company, et al.*, Case No. 1:20-cv-06861-JGK (the “*McAdams* action”). The *McAdams* action alleges substantially the same allegations against Kodak and Defendant Continenza as this action, as well as additional allegations that Kodak and Continenza had improperly leaked the news to the market prior to the official announcement and that the status and likelihood of the loan was misrepresented to the market. Additionally, the *McAdams* action alleges a longer class period, from July 27, 2020 to August 11, 2020. The instant action alleges a class period of July 27, 2020 to August 7, 2020. A more inclusive class period is favored at the lead plaintiff stage. *Deering v. Galena Biopharma, Inc.*, No. 3:14-CV-00367-SI, 2014 WL 4954398, at *10 (D. Or. Oct. 3, 2014) (recognizing that courts commonly select “most inclusive class period” at lead plaintiff stage); *In re Gentiva Sec. Litig.*, 281 F.R.D. 108, 113-114 (E.D.N.Y. 2012) (court favoring a broader class which “encompasses more potential class members” early in the litigation at the lead plaintiff stage).

Law”) as Lead Counsel.

BACKGROUND

This action was commenced on August 13, 2020 against the Company and certain of its officers and directors, alleging violations of the Exchange Act. The next day, an early notice was issued pursuant to the PSLRA, advising class members of, *inter alia*, the allegations and claims in the complaint, the Class Period, and their option to seek appointment as Lead Plaintiff. A copy of the early notice is attached as Exhibit 1 to the Declaration of Laurence M. Rosen filed herewith (“Rosen Decl.” or “Rosen Declaration”).

Defendant Kodak purports to be a technology company that provides hardware, software, consumables, and services to customers in commercial print, packaging, publishing, manufacturing, and entertainment. Defendant Kodak is a New Jersey corporation with its principal executive offices located in Rochester, New York. Kodak’s securities are traded on the NYSE under the symbol “KODK.”

According to the complaint, Defendants throughout the Class Period made false and/or misleading statements and/or failed to disclose that: (1) Kodak had granted Defendant Continenza and several other Company insiders millions of dollars’ worth of stock options immediately prior to the Company publicly disclosing that it had received a \$765 million loan from the U.S. International

Development Finance Corporation (“DFC”) to produce drugs to treat COVID-19, which Defendants knew would cause Kodak’s stock to immediately increase in value once the deal was announced; (2) while in possession of this material non-public information, Defendant Continenza and other Company insiders purchased tens of thousands of the Company’s shares immediately prior to the announcement at prices that they knew would increase exponentially once news of the loan became public; and (3) as a result, Defendants’ statements about its business, operations, and prospects, were materially false and misleading and/or lacked a reasonable basis at all relevant times.

In the days following the deal announcement, details began to emerge revealing the Company’s further deception surrounding the compensation scheme. On August 1, 2020, a Reuters article reported new details of the “unusual” 1.75 million option grant to Defendant Continenza. The article emphasized that the options award “occurred because of an understanding” between Continenza and Kodak’s Board of Directors “that had previously neither been listed in his employment contract nor made public.” On this news, Kodak’s shares fell \$6.91 per share the next trading day, or 32%, from \$21.85 per share on July 31, 2020, to \$14.94 per share on August 3, 2020.

On August 4, 2020, before the market opened, an article published on CQ

Roll Call reported that United States Senator Elizabeth Warren submitted a letter to the SEC requesting an investigation of the deal and Kodak for apparent violations of the securities laws and SEC regulations. The letter noted that on June 23, 2020, Defendant Continenza purchased 46,737 shares and board member Philippe Katz purchased 5,000 shares—stock trades that “raise questions about several different insider trading laws.” Also on August 4, 2020, according to an article published in the Wall Street Journal, the SEC commenced an investigation into “how Kodak controlled disclosure of the loan, word of which began to emerge on July 27, 2020.” Additionally, on August 4, 2020, Kodak Board member George Karfunkel and his wife disclosed to the SEC a July 29, 2020 donation of 3 million of their 6.3 million Kodak shares to a religious institution in Brooklyn, New York, that he actually founded and controlled, a gift valued at \$116.3 million. As a result of the revelations on August 4, 2020, the Company’s stock price dropped another \$0.54, or 4%, from \$14.94 per share on August 3, 2020, to \$14.40 per share on August 4, 2020.

On August 5, 2020, several Congressional committees sent a joint letter to Defendant Continenza seeking documents about the loan, insider trading, and stock options for their review of “DFC’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 the DFC’s Chief Executive Officer on the same day, inquiring about the Kodak loan, which the letter noted 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 awareness and Congressional and regulatory scrutiny of Kodak’s fraudulent scheme, the DFC paused the deal. On August 7, 2020, after the market closed, the DFC announced, “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.” On this news, the Company’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.

Then, on August 11, 2020, after the market closed, in connection with the Company’s release of its financial results for the second quarter, Kodak held a conference call during which Defendant Continenza repeatedly referred to the Loan as a “potential loan”, in stark contrast to his statements on July 29, 2020 that the Loan was effectively a done deal. Additionally, Defendant Continenza said that “we ... support the DFC’s decision to wait clarification before moving forward with the loan process.” Following this news, Kodak’s shares declined farther by an

additional 2.9% to close at \$9.72 per share on August 12, 2020.

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

ARGUMENT

I. MOVANT SHOULD BE APPOINTED AS LEAD PLAINTIFF

The PSLRA sets forth procedures for the selection of Lead Plaintiff in class actions brought under the Exchange Act. The PSLRA directs courts to consider any motion to serve as Lead Plaintiff filed by class members in response to a published notice of class action by the latter of (i) 90 days after the date of publication, or (ii) as soon as practicable after the Court decides any pending motion to consolidate. 15 U.S.C. § 78u-4(a)(3)(B) (i) and (ii).

The PSLRA provides a "rebuttable presumption" that the most "adequate plaintiff" to serve as Lead Plaintiff is the "person or group of persons" that:

- (aa) has either filed the complaint or made a motion in 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)(iii).

As set forth below, Movant satisfies all of these criteria and is thus entitled to the presumption that he is the most adequate plaintiff of the class, and that, as a result, Movant should be appointed as Lead Plaintiff.

A. MOVANT IS WILLING TO SERVE AS CLASS REPRESENTATIVE

Movant has made a timely motion in response to a PSLRA early notice. *See* Rosen Decl., Ex. 1. Additionally, as set forth in his certification, filed concurrently herewith, Movant has reviewed the complaint and is willing to serve as a representative of the class. *See* Rosen Decl., Ex. 2. Accordingly, Movant satisfies the first requirement to serve as Lead Plaintiff for the class.

B. MOVANT HAS THE LARGEST FINANCIAL INTEREST

The PSLRA requires a court to adopt a rebuttable presumption that “the most adequate plaintiff . . . is the person or group of persons that . . . has the largest financial interest in the relief sought by the class.” 15 U.S.C. § 78u-4(a)(3)(B)(iii). In assessing the largest financial interest, courts in the Third Circuit assess the following three factors in determining the movant with the largest financial interest: (i) the number of shares the movant purchased during the class period; (ii) the total net funds the movant expended during the class period; and (iii) the approximate

loss the movant suffered. *In re Vicuron Pharm., Inc. Sec. Litig.*, 225 F.R.D. 508, 511 (E.D. Pa. 2004) (recognizing that the financial loss is the most significant of these factors).

Movant (i) purchased 30,000 shares of Kodak during the Class Period, (ii) expended \$1,080,210.00 in net funds, and (iii) lost \$630,246.00 in connection with his purchases of Kodak securities. *See* Rosen Decl., Ex. 3.

Movant is not aware of any other movants that have suffered greater losses in Kodak securities during the Class Period. Accordingly, Movant satisfies the largest financial interest requirement to be appointed as Lead Plaintiff for the class.

C. MOVANT SATISFIES THE REQUIREMENTS OF RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE

The PSLRA further provides that, in addition to possessing the largest financial interest in the outcome of the litigation, the Lead Plaintiff must “otherwise satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure.” 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(cc). Rule 23(a) provides that a party may serve as a class representative if the following four requirements are satisfied:

- (1) the class is so numerous that 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.

In making its determination that the Lead Plaintiff satisfies the requirements of Rule 23, the Court need not raise its inquiry to the level required in ruling on a motion for class certification – a *prima facie* showing that Movant satisfies the requirements of Rule 23 is sufficient. *Vicuron*, 225 F.R.D. at 511; *In re Fuwei Films Sec. Litig.*, 247 F.R.D. 432, 439 (S.D.N.Y. 2008). Moreover, “typicality and adequacy of representation are the only provisions relevant to a determination of lead plaintiff under the PSLRA.” *In re Oxford Health Plans, Inc. Sec. Litig.*, 182 F.R.D. 42, 49 (S.D.N.Y. 1998).

Movant fulfills the requirements of Rule 23. Movant’s claims share substantially similar questions of law and fact with the members of the class, and his claims are typical of those of the members of the class. Movant and all members of the class allege that defendants violated the Exchange Act by failing to disclose material facts about the Company’s business and financial condition, including trading by insiders on undisclosed information and such behaviors endangering the validity of the loan. Movant, as did all of the members of the class, purchased Kodak securities at prices artificially inflated by Defendants’ misstatements and omissions, and were damaged thereby. These shared claims also satisfy the requirement that the claims of the representative parties be typical of the claims of the class.

Thus, the close alignment of interests between Movant and other class members, as well as the strong desire of the proposed Lead Plaintiff to prosecute this action on behalf of the class, provide ample reasons to grant Movant's motion to serve as Lead Plaintiff.

D. MOVANT WILL FAIRLY AND ADEQUATELY REPRESENT THE INTERESTS OF THE CLASS

The presumption in favor of appointing Movant as Lead Plaintiff may be rebutted only upon proof "by a purported member of the plaintiffs' class" that the 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)(I).

Movant's ability and his desire to represent the Class fairly and adequately is discussed above. Movant is not aware of any unique defenses Defendants could raise against him that would render Movant inadequate to represent the Class.

Moreover, Movant is an experienced trader. He received his undergraduate degree from Georgetown University and his MBA from the University of Georgia Terry College of Business. He is President of Atlanta-based Covington Investments, LLC – a privately owned firm that owns and operates senior living communities

Accordingly, the Court should appoint Movant as Lead Plaintiff for the Class.

II. MOVANT’S SELECTION OF COUNSEL SHOULD BE APPROVED

The PSLRA vests authority in the lead plaintiff to select and retain lead counsel, subject to the approval of the Court. 15 U.S.C. § 78u-4(a)(3)(B)(v). The Court should interfere with lead plaintiff’s selection only when necessary “to protect the interests of the class.” 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II)(aa).

Movant has selected Rosen Law as Lead Counsel. The firm has been actively researching Movant’s and the Class’ claims, as well as reviewing publicly available financial and other documents while gathering information in support of the claims against the defendants. Furthermore, the firm is experienced in the area of securities litigation and class actions, having been appointed as lead counsel in securities class actions in this Court, and in numerous courts throughout the nation. The firm has obtained substantial recoveries on behalf of investors through their prosecution of securities fraud class actions and other complex litigation. See Rosen Decl., Ex. 4.

As a result of the firm’s experience in litigation involving issues similar to those raised in this action, Movant’s counsel has the skill and knowledge to prosecute this action effectively and expeditiously. Thus, the Court may be assured that by approving Movant’s selection of Lead Counsel, the members of the class will receive the best legal representation available.

CONCLUSION

For the foregoing reasons, Movant respectfully requests that the Court issue an Order: (1) appointing Movant as Lead Plaintiff; and (2) approving Lead Plaintiff's selection of Rosen Law as Lead Counsel.

Dated: October 13, 2020

Respectfully submitted,

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*[Proposed] Lead Counsel for Plaintiff and
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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2020, a true and correct copy of the foregoing document was served by CM/ECF to the parties registered to the Court's CM/ECF system.

/s/ Laurence M. Rosen