

LEVI & KORSINSKY, LLP

Eduard Korsinsky (EK-8989)

55 Broadway, 10th Floor

New York, New York 10006

Tel.: (212) 363-7500

Fax: (212) 363-7171

Email: ek@zlk.com

*Counsel for Movant Doug Atkin
and [Proposed] Lead Counsel for the Class*

**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

**MEMORANDUM OF LAW IN
SUPPORT OF DOUG ATKIN'S
MOTION FOR APPOINTMENT
AS LEAD PLAINTIFF AND
APPROVAL OF SELECTION OF
LEAD COUNSEL**

ORAL ARGUMENT REQUESTED

MOTION DATE: November 2, 2020

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Doug Atkin (“Movant”), by counsel, respectfully submits this Memorandum of Law pursuant to 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”) for entry of an order: (i) appointing Movant as Lead Plaintiff in the above-captioned action (the “Action”); (ii) approving Movant’s selection of the law firm of Levi & Korsinsky, LLP (“Levi & Korsinsky”) to serve as Lead Counsel under 15 U.S.C. § 78u-4(a)(3)(B)(v) and (iii) granting such other and further relief as the Court may deem just and proper.

I. INTRODUCTION

The Action is brought pursuant to Sections 10(b) and 20(a) of the Exchange Act, 15 U.S.C. § 78j(b) and 78t(a), and U.S. Securities and Exchange Commission Rule 10b-5 promulgated thereunder, against: Eastman Kodak Company (“Kodak” or the “Company”); the Company’s Chief Executive Officer (“CEO”), James V. Continenza (“Continenza”); and the Company’s Chief Financial Officer, David Bullwinkle (“Bullwinkle”) for violations of federal securities laws on behalf of a class of purchasers or sellers of Kodak securities between July 27, 2020 through August 11, 2020, inclusive (the “Class Period”).¹

¹ An additional complaint against Kodak was filed in United States District Court for the Southern District of New York on August 26, 2020, entitled *McAdams v. Eastman Kodak Company, et al.*, C.A. No. 1:20-cv-6861 (S.D.N.Y.) (the “*McAdams Action*”). The *McAdams Action* expanded the Class Period and Class definition in

Pursuant to the PSLRA, this Court must appoint the member of the class “most capable of adequately representing the interests of class members” to serve as lead plaintiff. *See* 15 U.S.C. § 78u-4(a)(3)(B)(i). Movant believes he is entitled to appointment as Lead Plaintiff as the movant with the largest financial interest that otherwise meets the applicable requirements of Rule 23 of the Federal Rules of Civil Procedure. During the Class Period Movant sustained approximately \$376,540.78 in losses as a result of purchasing and/ or selling Kodak securities at artificially inflated prices.² Movant also respectfully requests that the Court approve Levi & Korsinsky as Lead Counsel. *See* 15 U.S.C. § 78u-4(a)(3)(B)(v) (“the most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class”).

II. STATEMENT OF FACTS

Kodak purports to be a global technology company that provides hardware, software, consumables, and services to customers in commercial print, packaging, publishing, manufacturing, and entertainment, with an historic basis on

this Action to include all persons and entities who purchased or sold the publicly traded securities of Kodak from July 27, 2020 through August 11, 2020. Movant uses the Class defined in the *McAdams* Action, as it is the most inclusive.

² *See* Declaration of Eduard Korsinsky in Support of the Doug Atkin’s Motion for Appointment as Lead Plaintiff and Approval of Selection of Lead Counsel, dated October 13, 2020 (“Korsinsky Decl.”), Ex. A (Movant’s PSLRA certification); Ex. B (Movant’s loss chart).

photography. ¶ 25.³ Kodak’s primary areas of business are Traditional Printing, Digital Printing, Advanced Materials and Chemicals, Brand, and All Other (comprised of the Company’s Eastman Business Park technology center and industrial complex). *Id.*

The Company is a New Jersey corporation with its principal executive offices located in Rochester, New York. ¶ 21. Kodak’s trades on the New York Stock Exchange (“NYSE”) under the ticker symbol “KODK.” *Id.*

On May 14, 2020, President Donald J. Trump signed an Executive Order delegating authority to the Chief Executive Officer of the U.S. International Development Finance Corporation (“DFC”) under the Defense Production Act of 1950 to “make loans, make provision for purchases and commitments to purchase, and take additional actions to create, maintain, protect, expand, and restore the domestic industrial base capabilities, including supply chains within the United States and its territories . . . needed to respond to the COVID-19 outbreak.” ¶ 26. According to a July 30, 2020 Bloomberg article, Kodak officially filed an application for the new program in mid-June. *Id.*

³ Citations to “¶ ___” are to paragraphs of the Class Action Complaint (the “Complaint”) filed in the Action. Citations to “*McAdams* ¶ ___” are to paragraphs of the Class Action Complaint (the “*McAdams* Complaint”) filed in the *McAdams* Action. The facts set forth in the Complaint and the *McAdams* Complaint are incorporated herein by reference.

On July 27, 2020, the beginning of the class period, Kodak announced to several media outlets in Rochester, New York that there was a “new manufacturing initiative that could change the course of history for Rochester and the American People.” ¶ 27.

As a result of Kodak’s announcement and the media reports, there was an immediate spike in the Company’s trading volume, which reached a volume of 1.65 million shares on July 27, 2020, compared to just under 75,000 shares on the previous trading day. ¶ 28. Kodak’s share price then increased \$0.52 cents, or 24%, from \$2.10 per share on July 24, 2020 to \$2.62 per share on July 27, 2020. *Id.*

On that same day, in efforts to profit from the use of material non-public information about the deal before its official disclosure, Kodak granted its CEO and Executive Chairman, Defendant Jim Continenza, 1.75 million stock options at a conversion price of between \$3.03 and \$12 per share. ¶ 34. Additionally, the Company awarded 45,000 stock options each to its CFO, Defendant David Bullwinkle, Vice President Randy Vandagriff, and General Counsel Roger Byrd. *Id.* On the day these options were awarded, Kodak’s stock price closed at \$2.62 per share, well below the lowest conversion price, meaning these options were “out of the money” when they were awarded. *Id.*

The next day, July 28, 2020, prior to the market opening, Kodak announced it was selected to receive the DFC Loan. *McAdams* ¶ 6. That same day,

RochesterFirst.com published an article entitled “Kodak lands \$765 million federal loan to develop prescription drug ingredients, aims to add 300 jobs in Rochester,” announcing that “Eastman Kodak Company officials, along with Washington D.C. leaders, announced an agreement for a \$765 million federal loan to support the launch of Kodak Pharmaceuticals — a new arm of the company that poses to transform the business into an industry leader in prescription drug manufacturing.”

¶ 29. This was the first such loan made under the DPA. *Id.*

In response to this news, Kodak shares skyrocketed, reaching an intra-day high of \$11.80 per share, 350% higher than the closing price the prior trading day, and closed at \$7.94 per share on unusually heavy trading volume of over 284 million shares, about 203% higher than the closing price of \$2.62 per share on July 27, 2020. *McAdams* ¶ 7. After the market closed on July 28, 2020, Kodak shares continued to rise during extended trading. *McAdams* ¶ 8.

The next morning, on July 29, 2020, before market open, Defendant Continenza was interviewed on CNBC’s Squawk Box during which he touted the loan and the Company’s shift to producing the ingredients for COVID-19 drugs. *McAdams* ¶ 9. In reaction to Defendant Continenza’s July 29, 2020 statements touting the DFC Loan, Kodak’s shares soared even further, reaching an intra-day high of \$60 per share on unusually heavy trading volume of over 276 million shares,

and closed up \$25.26 per share at \$33.20 per share, 318% greater than the closing price of \$7.94 per share on July 28, 2020. *McAdams* ¶ 10.

But in the days following the deal announcement, the truth began to fully emerge revealing Kodak's deception surrounding the compensation scheme. ¶ 37. After the market closed on July 29, 2020, the *Wall Street Journal* reported that Kodak had leaked news of the \$765 million DFC Loan to certain media outlets on July 27, 2020, after which the Company sought to cover up its mistake by secretly attempting to retract those stories. *McAdams* ¶ 12. Following the *Wall Street Journal's* article, the Company's stock fell more than 10% during trading on July 30, 2020, and declined another 27% on July 31, 2020, to close at \$21.85 per share. *Id.*

More reports came out over the weekend regarding the secret option grants just prior to the announcement of the DFC Loan, causing Kodak to drop 31.6% to close at \$14.94 per share on August 3, 2020. ¶ 6; *McAdams* ¶ 13.

As public awareness of the deal increased, several government officials and the SEC also took action. ¶ 39. Specifically, on August 4, 2020, an article published on *CQ Roll Call* reporting 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. *Id.*; *McAdams* ¶ 14. The letter stated that on June 23, 2020, Defendant Continenza purchased 46,737 shares and

board member Philippe Katz (“Katz”) purchased 5,000 shares—stock trades that “raise questions about several different insider trading laws.” ¶ 39.

Furthermore, on August 4, 2020, Kodak Board member George Karfunkel (“Karfunkel”) and his wife Renee Karfunkel revealed 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, controlled and benefited from. ¶ 42. *McAdams* ¶ 16. As indicated by the average of the stock’s high and low that day of \$38.75, the gift valued at \$116.3 million, an amount signifying “the single largest gift recorded to a religious group.” *Id.*

As a result of these revelations, Kodak’s stock price plummeted over \$29 per share over four trading days, falling from \$33.20 per share at opening on July 29, 2020 to closing at just \$14.40 per share on August 4, 2020—a decline of over 57% as a result of Defendant’s fraudulent actions. ¶ 43.

Finally, in response to the increasing public, Congressional, and regulatory scrutiny of Kodak’s fraudulent scheme, the DFC paused the deal. ¶ 47. 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.” *Id.*

On this news, shares of Kodak dropped another 28%, from \$14.88 per share at close of trading on August 7, 2020, to \$10.73 per share on August 10, 2020. *Id.*

Kodak's shares continued to decline the next trading day, falling by 6.7% to close at \$10.01 per share on August 11, 2020.

Then, On August 11, 2020, the *Wall Street Journal* published an article entitled, "Kodak Insider Makes Well-Timed Stock Gift of \$116 Million to Religious Charity He Started." ¶ 42. *McAdams* ¶ 16. The article stressed that the congregation had only been incorporated in 2018 and used a Brooklyn accountant's office as its mailing address. *Id.* That same day after the market closed, 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. *McAdams* ¶ 21. Additionally, Defendant Continenza said that "we ... support the DFC's decision to wait clarification before moving forward with the loan process." *Id.* Following this news, Kodak's shares declined farther by an additional 2.9% to close at \$9.72 per share on August 12, 2020. *Id.*

III. ARGUMENT

A. The PSLRA Standard for Appointing Lead Plaintiff

The PSLRA sets forth the procedure for the selection of a lead plaintiff in "each private action arising under [the Exchange Act] that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure." 15 U.S.C. § 78u-4(a)(1); *see* 15 U.S.C. § 78u-4(3)(B). Specifically, within 20 days after the date on which a class action is filed, the plaintiff 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 the 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).

Further, the PSLRA directs the Court to consider any motions by plaintiff or purported class members to serve as Lead Plaintiff in response to any such notice within 90 days after the date of publication of the notice. 15 U.S.C. § 78u-4(a)(3)(B). Under the Exchange Act, the Court “shall” appoint the “most adequate plaintiff,” and is to presume that plaintiff is the person which:

- (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)(I).

B. Movant is the “Most Adequate Plaintiff” under the Exchange Act

Movant respectfully submits that he is the “most adequate plaintiff” because he has complied with the PSLRA procedural requirements, has the largest financial

interest of any movant, and satisfies Rule 23's typicality and adequacy requirements. Further, Movant has selected and retained counsel experienced in the prosecution of securities class actions to represent the proposed class. *See* Korsinsky Decl., Ex. D (Firm Resumé of Levi & Korsinsky). Accordingly, Movant satisfies the PSLRA's filing requirements for seeking appointment as lead plaintiff and, therefore should be appointed Lead Plaintiff.

1. Movant is Willing to Serve as Class Representative

On August 14, 2020, Plaintiff in the action caused a notice (the "Notice") to be published pursuant to Section 21D(a)(3)(A) of the Exchange Act, which announced that a securities class action had been filed against Defendants and which advised putative class members that they have until October 13, 2020 to file a motion to seek appointment as a Lead Plaintiff in the action.⁴ Movant has reviewed the complaint filed in the pending Action and has timely filed this motion pursuant to the Notice.

2. Movant has the Largest Financial Interest in the Relief Sought by the Class

Under the Exchange Act, a rebuttable presumption exists whereby the movant with the largest financial interest in the litigation and who otherwise satisfies the

⁴ The Action was filed in this Court on August 13, 2020. The next day, the Notice was published over *Globe Newswire*, a widely circulated national business-oriented wire service. *See* Korsinsky Decl., Exhibit C.

requirements of Rule 23 of the Federal Rules of Civil Procedure is presumed to be the most adequate plaintiff to lead the action. 15 U.S.C. § 78u-4(a)(3)(B)(iii); *Sklar v. Amarin Corp. PLC*, Civil Action No. 13-cv-06663-FLW-TJB, 2014 WL 3748248, at *4 (D.N.J. July 29, 2014); *see also In re Opnext, Inc.*, No. 08cv-0920, 2008 U.S. Dist. LEXIS 60678 (D.N.J. Aug. 6, 2008). In determining the “largest financial interest” for purposes of lead plaintiff appointment, courts in the Third Circuit consider (1) the number of shares that the movants purchased during the putative class period; (2) the total net funds expended by the plaintiff during the class period; and (3) the approximate losses suffered by the plaintiff. *See In re Cendant Corp. Litig.*, 264 F.3d 201, 262 (3d Cir. 2001) (“[W]e agree with the many district courts that have held that courts should consider, among other things: (1) the number of shares that the movants purchased during the putative class period; (2) the total net funds expended by the plaintiff during the class period; and (3) the approximate losses suffered by the plaintiff (citing *Lax v. First Merch. Acceptance Corp.*, No. 97 C 2715, 1997 WL 461036, at *5 (N.D. Ill. Aug. 11, 1997); *In re Nice Sys. Sec. Litig.*, 188 F.R.D. 206, 217 (D.N.J. 1999); *In re Olsten Corp. Sec. Litig.*, 3 F. Supp. 2d 286, 295 (E.D.N.Y. 1998) (same)”); *see also Sklar*, 2014 WL 3748248, at *4.

During the Class Period, Movant sustained losses in the amount of approximately \$376,540.78 as a result of trading Kodak securities at artificially inflated prices. *See Korsinsky Decl.*, Ex. B. Movant is not aware of any other

movant with a larger financial interest and believes he has the largest financial interest of any lead plaintiff movants. Therefore, Movant is presumptively entitled to appointment as the Lead Plaintiff.

C. Movant is Qualified Under Rule 23

The PSLRA provides that the lead plaintiff must also “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 only 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.

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

For purposes of appointing lead plaintiff, the determination of whether the movants with the largest interest in the case otherwise satisfies Rule 23 “should be confined to determining whether the movants have made a prima facie showing of typicality and adequacy.” *Sklar*, 2014 WL 3748248, at *5, citing *In re Cendant Corp. Litig.*, 264 F.3d at 262. The presumption that the movants with the largest financial interest are the most adequate plaintiff to lead the action may be rebutted only upon

proof that the movants (1) will not fairly and adequately protect the interests of the class, or (2) are subject to unique defenses that render such movant incapable of adequately representing the class. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II), *In re Opnext, Inc.*, 2008 U.S. Dist. LEXIS 60678, at *7- 10; *see also Sklar*, 2014 WL 3748248, at *4.

Of the four prerequisites to class certification, only two – typicality and adequacy – directly address the personal characteristics of the class representatives. 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.

As detailed below, Movant satisfies the typicality and adequacy requirements of Rule 23(a), thereby justifying his appointment as Lead Plaintiff in this Action.

1. Movant’s Claims are Typical of the Claims of the Class

The typicality requirement of Rule 23(a) is satisfied when (1) the claims of the proposed lead plaintiff arise from the same course of conduct that gives rise to the other purported class members’ claims, and (2) the claims are based on the same legal theory. *See In re Merck & Co., Inc. Securities*, No. 05-cv-1151, 2013 U.S. Dist. LEXIS 13511, at *39-40 (D.N.J. Jan. 20, 2013), *In re PharmaPrint, Inc. Sec.*

Litig., No. 00-cv-00061, 2002 U.S. Dist. LEXIS 19845, at *16 (D.N.J. April 17, 2002).

The claims asserted by Movant are based on the same legal theory and arise out of the same course of events as the other purported class members' claims. Movant purchased and/or sold Kodak securities, as did each member of the proposed class, at prices artificially inflated by Defendants' false and misleading statements and was damaged thereby. Thus, Movant satisfies the typicality requirement of Rule 23(a).

2. Movant Will Fairly and Adequately Represent the Class' Interests

Under Rule 23(a)(4) of the Federal Rules of Civil Procedure, the representative party must "fairly and adequately protect the interest of the class." Fed. R. Civ. P. 23(a)(4). A movant can demonstrate adequacy by showing that "(a) the [movant's] attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the [movant] must not have interests antagonistic to those of the class." *In re PharmaPrint, Inc. Sec. Litig.*, 2002 U.S. Dist. LEXIS 19845, at *16-17. Here, Movant's interests are clearly aligned with the members of the proposed class. Not only is there no evidence of any antagonism between Movant's interests and those of the class, but Movant has a significant and compelling interest in prosecuting the Action based on the large financial losses he has suffered as a result of the wrongful conduct alleged in the Action. This

motivation, combined with Movant's identical interest with the members of the Class, demonstrates that the Movant will vigorously pursue the interests of the Class. As detailed above, Movant's claims raise similar questions of law and fact as claims of the members of the class, and Movant's claims are typical of the members of the class. Further, Movant has demonstrated his adequacy and willingness to serve as and assume the responsibilities of a lead plaintiff, as reflected in his signed certification. *See* Korsinsky Decl., Ex. A. Having suffered substantial losses, Movant will be a zealous advocate on behalf of the class.

In addition, Movant has selected Levi & Korsinsky – counsel highly experienced in prosecuting securities class actions – to represent them. *See* Korsinsky Decl., Ex. D; Thus, the close alignment of interests between Movant and other class members, and Movant's strong desire to prosecute the Action on behalf of the class, provide ample reason to grant Movant's motion for appointment as Lead Plaintiff in the Action.

Accordingly, at this stage of the proceedings, the Movant has made the preliminary showing necessary to satisfy the typicality and adequacy requirements of Rule 23 and, therefore, satisfies 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(cc). In addition, because the Movant has sustained the largest amount of losses from Defendants' alleged wrongdoing, he is, therefore, the presumptive lead plaintiff in

accordance with 15 U.S.C. § 78u-4(3)(B)(iii)(I), and should be appointed as such to lead the Action.

3. This Court Should Approve Movant's Choice of Counsel

The Exchange Act vests authority in the lead plaintiff to select and retain lead counsel, subject only to court approval. *See* 15 U.S.C. § 78u-4(a)(3)(B)(v). Movant has retained Levi & Korsinsky to file moving papers on behalf of himself seeking appointment as Lead Plaintiff and to serve as lead counsel to pursue this litigation on behalf of Movant and the class. Levi & Korsinsky's attorneys have extensive experience in the area of securities litigation and have successfully prosecuted numerous securities class actions on behalf of injured investors. *See* Korsinsky Decl., Ex. D; *see also Isaacs v. Musk*, No. 18-CV-04865-EMC, 2018 U.S. Dist. LEXIS 200717, at *20 (N.D. Cal. Nov. 27, 2018), *reconsideration denied sub nom. In re Tesla, Inc. Sec. Litig.*, No. 18-CV-04865-EMC, 2018 U.S. Dist. LEXIS 212238 (N.D. Cal. Dec. 17, 2018) (noting Levi & Korsinsky "is experienced in securities fraud litigation and has been appointed Lead Counsel in other securities class actions."); *Francisco v. Abengoa, S.A.*, 15 Civ. 6279 (ER), 2016 U.S. Dist. LEXIS 68145, at *21 (S.D.N.Y. May 24, 2016) (noting that given "Levi & Korsinsky's track record, the Court, like many others in this Circuit before it, concludes that the firm is qualified to serve as lead counsel of the class"); *Levin v. Res. Capital Corp.*, 15 Civ. 7081 (LLS), 2015 U.S. Dist. LEXIS 162377, at *4

(S.D.N.Y. Nov. 4, 2015) (appointing Levi Korsinsky as lead counsel and noting that it is “a firm which is well qualified and has successfully served as lead counsel or co-lead counsel in numerous complex securities class actions”); *Pope v. Navient Corp.*, Civil No. 17-8373 (RBK/AMD), 2018 U.S. Dist. LEXIS 17340, at *13-14 (D.N.J. Feb. 2, 2018) (appointing Levi & Korsinsky as lead counsel as it “is clearly capable of handling this matter—the firm has extensive experience in private securities litigation and has received numerous favorable judgments in its past representations.”); *Inchen Huang v. Depomed, Inc.*, 289 F. Supp. 3d 1050, 1055 (N.D. Cal. 2017) (appointing Levi Korsinsky as lead counsel); *Polat v. Regulus Therapeutics, Inc.*, No. 3:17-cv-00182-BTM-RBB, 2017 U.S. Dist. LEXIS 177872, at *3 (S.D. Cal. Oct. 26, 2017) (same).

IV. CONCLUSION

Movant has satisfied each of the PSLRA’s requirements for appointment as lead plaintiff. As such, Movant respectfully requests that the Court appoint him as Lead Plaintiff, approve his selection of counsel, and grant such other relief as the Court may deem just and proper.

Dated: October 13, 2020

Respectfully submitted

LEVI & KORSINSKY, LLP

/s/ Eduard Korsinsky
Eduard Korsinsky (EK-8989)
55 Broadway, 10th Floor
New York, New York 10006

Tel.: (212) 363-7500

Fax: (212) 363-7171

Email: ek@zlk.com

*Counsel for Movant Doug Atkin and
Proposed Counsel for the Class*

CERTIFICATE OF SERVICE

I, Eduard Korsinsky, hereby certify that on October 13, 2020, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the registered participants as identified on the Notice of Electronic Filing.

/s/Eduard Korsinsky

Eduard Korsinsky