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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.

Case No. 3:20-cv-10462-FLW-  
ZNQ

CLASS ACTION

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

MOTION DATE: November 16,  
2020

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## I. INTRODUCTION

Before this Court is a securities class action brought on behalf of purchasers of the common stock of Eastman Kodak Company (“Kodak” or the “Company”) between July 27, 2020 and August 11, 2020, inclusive (the “Class Period”),<sup>1</sup> which alleges violations of Sections 10(b) and 20(a) 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. §§ 78(j)(b) and 78(t)) and Rule 10b-5 promulgated thereunder (17 C.F.R. § 240.10b-5).

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<sup>1</sup> Another securities class action was subsequently filed against Kodak in the Southern District of New York. *McAdams v. Eastman Kodak Co.*, No. 20-cv-06861-JGK (S.D.N.Y.). The *McAdams* lawsuit does not name David Bullwinkle as a defendant.

The *McAdams* lawsuit extends the Class Period to August 11, 2020. PSLRA notices have been issued advising class members that the class period now ends on August 11, 2020. *See* Declaration of Audra DePaolo (“DePaolo Decl.”), filed contemporaneously herewith, at Ex. B. When presented with multiple, varying class periods, it is widely accepted that courts should use the class period spanning the longer time frame at the lead plaintiff appointment stage. *See, e.g., Reid. v. Hemispherx Biopharma, Inc.*, No. 09-cv-5262, 2010 WL 11707722, at \*2 (E.D. Pa. Feb. 12, 2010); *In re Party City Sec. Litig.*, 189 F.R.D. 91, 94, n.3 (D.N.J. 1999). Accordingly, Ms. Welkhammer relies upon the slightly longer class period alleged in *McAdams* for purposes of her Motion.

Ms. Welkhammer is filing a notice in the *McAdams* lawsuit that she has filed this Motion before this Court. If Ms. Welkhammer is appointed as Lead Plaintiff here, she will move to have the *McAdams* action transferred to this Court and then consolidated with the above-captioned *Tang* action.

Margaretha Welkhammer hereby moves this Court for an order: (i) appointing Ms. Welkhammer as Lead Plaintiff; and (ii) approving of her selection of Block & Leviton LLP to serve as Lead Counsel.

This motion is made on the grounds that Ms. Welkhammer is the most adequate plaintiff as defined by the PSLRA because she believes she possesses the largest financial interest in the relief sought by the class, having lost approximately \$348,813.95 on her purchases of Kodak shares. Ms. Welkhammer's claims are also typical of the claims of the putative class, and she will fairly and adequately represent the interests of the class. Ms. Welkhammer is, therefore, the presumptive Lead Plaintiff.

Accordingly, the Court should appoint Ms. Welkhammer as Lead Plaintiff and approve of her selection of Block & Leviton LLP as Lead Counsel.

## **II. FACTUAL BACKGROUND<sup>2</sup>**

Kodak is a technology company that provides hardware, software, consumables, and services to customers in commercial print, packaging, publishing, manufacturing, and entertainment. ¶ 1. On July 27, 2020, the start of the Class Period, Kodak issued a statement to media outlets based in Rochester, New York, where Kodak is headquartered, on the imminent public announcement of a “new

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<sup>2</sup> The facts are taken from the Complaint that was filed in this action, ECF No. 1. References to “¶” refer to that Complaint, unless otherwise noted.

manufacturing initiative” involving the U.S. International Development Finance Corporation (the “DFC”) and the response to COVID-19. ¶ 2. After media publication of Kodak’s initial statement about the deal, the Company claimed that this information was released inadvertently. *Id.*

Also on July 27, 2020, Kodak granted its Chief Executive Officer and Executive Chairman, Jim Continenza, 1.75 million stock options at a conversion price of between \$3.03 and \$12.00 per share. ¶ 3. The Company also awarded 45,000 stock options each to its Chief Financial Officer, Defendant David Bullwinkle, Vice President Randy Vandagriff, and General Counsel Roger Byrd. *Id.* On July 27, 2020, Kodak’s stock price closed at \$2.62 per share, well below the lowest conversion price for these stock options, meaning the options were “out of the money” when they were awarded. *Id.*

On July 28, 2020, shares of Kodak common stock jumped 200%, from a close of \$2.62 on July 27, 2020 to \$7.94 per share, following news that Kodak had won a \$765 million government loan from the DFC under the Defense Protection Act to produce pharmaceutical materials, including ingredients for COVID-19 drugs. ¶ 4. Shares again surged on July 29, 2020, by over 300%, to a close of \$33.20. *Id.* This massive increase allowed Defendant Continenza and other Kodak insiders to enrich themselves spectacularly from the compensation scheme, as their stock options were

now very much “in the money.” *Id.* Defendant Continenza alone saw the value of his options go from \$0 to \$50 million in just 48 hours. *Id.*

On August 1, 2020, however, *Reuters* reported new details of the “unusual” 1.75 million option grant to Defendant Continenza. ¶ 5. The *Reuters* article emphasized that the options award “occurred because of an understanding” between Defendant Continenza and the Company’s Board of Directors “that had previously neither been listed in his employment contract nor made public.” *Id.* On this news, Kodak shares fell \$6.91 per share, or 32% on August 3, 2020. ¶ 6.

Then on August 4, 2020, an article published on *CQ Roll Call* reported that U.S. Senator Elizabeth Warren submitted a letter to the U.S. Securities Exchange Commission requesting an investigation of the deal and Kodak for apparent violations of the securities laws and SEC regulations. ¶ 7. Senator Warren’s letter also pointed to Kodak’s July 27, 2020 announcement of the deal to some media outlets, followed by the subsequent frenzy in trading of its shares – 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 into “how Kodak handled what appears to be ‘nonintentional disclosure of material nonpublic information,’” in possible violation of Rule 100 of SEC Regulation FD. ¶ 8.

Also on August 4, 2020, an article published in the *Wall Street Journal* announced that the SEC had commenced an investigation into “how Kodak

controlled disclosure of the loan, word of which began to emerge on July 27, 2020.”

¶ 9. Again 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 Mr. Karfunkel founded and controlled, a gift valued at \$116.3 million. ¶ 10. This donation occurred one day after the Defense Protection Act loan announcement – the day Kodak’s stock price peaked – and was provided to a congregation that had only been incorporated since 2018, used a Brooklyn accountant’s office as its mailing address, had no website, and for which Mr. Karfunkel himself served as the President and Chief Executive Officer. *Id.* An article in *Mother Jones* found that the Karfunkels would be able to “pocket a deduction between \$52.5 million and \$180 million.” *Id.* As a result of the revelations on August 4, 2020, Kodak’s stock price fell another \$0.54, or 4%, to a close of \$14.40 on August 4, 2020. ¶ 11.

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” that raised “questions that must be thoroughly examined.” ¶ 12. Next, on August 7, 2020, the DFC announced: “[o]n 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.” ¶ 13. On this news, the stock fell another 28%, to a close of \$10.73 per share on August 10, 2020. ¶ 14.

Finally, on August 11, 2020, after the markets closed, Kodak had a conference call during which Defendant Continenza referred to the DFC Loan as a “potential loan,” in stark contrast to his statements on July 29, 2020 that the Loan was effective a done deal. *See McAdams*, No. 1:20-cv-06861-JGK, ECF No. 1, at ¶ 21. On this news, the Company’s shares fell again, to a close of \$9.72 per share on August 12, 2020. *Id.*

### **III. ARGUMENT**

#### **A. The Court Should Appoint Ms. Welkhammer as Lead Plaintiff.**

##### **1. The Procedure Required by the PSLRA**

The PSLRA established a procedure governing the appointment of the 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) & (a)(3)(B)(i).

*First*, the plaintiff who files the initial action must publish a notice to the class, within 20 days of filing the action, informing class members of their right to file a motion for appointment as lead plaintiff. 15 U.S.C. § 78u-4(a)(3)(A)(i). Within 60 days after publication of the notice (*i.e.*, today, October 13, 2020), any person who

is a member of the proposed class may apply to the Court to be appointed as lead plaintiff, whether or not they have previously filed a complaint in the action. 15 U.S.C. § 78u-4(a)(3)(A) & (B).

*Second*, the PSLRA provides that, within 90 days after publication of the notice, the Court shall consider any motion made by a class member and shall appoint as lead plaintiff the members of the class the Court determines to be most capable of adequately representing the interests of class members. 15 U.S.C. § 78u-4(a)(3)(B). In determining the “most adequate plaintiff,” the PSLRA provides that the court shall adopt a presumption that the most adequate plaintiff in any private action arising under this Act 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); *see also In re Cendant Corp. Litig.*, 264 F.3d 201 (3d Cir. 2001). This presumption may be rebutted “only upon proof by a member of the purported plaintiff class” that the presumptively most adequate plaintiff “will not fairly and adequately protect the interests of the class” or “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); *Cendant*, 264 F.3d at 268.

**B. Ms. Welkhammer Has Timely Moved for Lead Plaintiff Appointment**

Pursuant to the provisions of the PSLRA and within the required time frame after publication of the notice, Ms. Welkhammer timely moves this Court to be appointed as Lead Plaintiff on behalf of all members of the class. Ms. Welkhammer has signed a certification pursuant to the PLRSA. *See* DePaolo Decl., Ex. C. She has selected and retained qualified counsel to represent her and the proposed class. *See* DePaolo Decl., Ex. E.

**C. Ms. Welkhammer Has the Largest Financial Interest in the Relief Sought by the Class**

During the Class Period, as evidenced by, among other things, Ms. Welkhammer's accompanying signed certification and loss chart, Ms. Welkhammer incurred a substantial loss of approximately \$348,813.95 on her class period transactions in Kodak common stock. *See* DePaolo Decl., Exs. C, D. At the time of this filing, Ms. Welkhammer believes that she possesses the largest financial interest of any movant seeking lead plaintiff status.

**D. Ms. Welkhammer Otherwise Satisfies Rule 23**

In addition to having the largest financial interest, a lead plaintiff must also "otherwise satisf[y] the requirements of Rule 23 of the Federal Rules of Civil Procedure." 15 U.S.C. §78u4(a)(3)(B)(iii)(I)(cc). Rule 23 requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class; and [that] the representative parties will fairly and adequately protect the

interests of the class.” Fed. R. Civ. P. 23(a)(3)-(4); *Cendant*, 264 F.3d at 263 (inquiry “should be confined to determining whether the movant has made a *prima facie* showing of typicality and adequacy”).

The adequacy and typicality requirements “serve as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 n.20 (1997) (citation omitted). Typicality exists when the plaintiff’s claims arise from the same series of events and are based on the same legal theories as the claims of all the class members. *See Cendant*, 264 F.3d at 264-65. In determining whether the movant satisfies the adequacy requirement, courts consider whether the movant “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.” *Id.* at 265 (citation omitted) (alterations in original). Ms. Welkhammer satisfies both of these requirements.

Here, Ms. Welkhammer’s claims are typical because, like all members of the class, she purchased or otherwise acquired Kodak common stock during the Class Period at prices artificially inflated by Defendants’ wrongful conduct and suffered damages as a result thereof. Ms. Welkhammer’s claims therefore arise from the same

course of events as all class members and will require similar (if not identical) legal arguments to prove Defendants' liability.

Ms. Welkhammer is also an adequate representative for the proposed class. Her substantial financial interest in the outcome of the action demonstrates that her interests are aligned with those of the class. Furthermore, Ms. Welkhammer has selected highly experienced counsel committed to zealously and efficiently prosecuting these actions to a successful conclusion. *See* DePaolo Decl., Ex. E. Thus, Ms. Welkhammer satisfies the adequacy requirements of Rule 23(a)(4).

Because Ms. Welkhammer is the presumptive "most adequate plaintiff" under the PSLRA, 15 U.S.C. §78u-4(a)(3)(B)(iii)(I), and no competing movant can rebut that presumption, the Court should appoint her Lead Plaintiff.

**E. The Court Should Appoint Ms. Welkhammer's Choice of Counsel**

Under the PSLRA, the proposed lead plaintiff shall, subject to Court approval, select and retain counsel to represent the class he seeks to represent. 15 U.S.C. § 78u-4(a)(3)(B)(v). Ms. Welkhammer has selected Block & Leviton LLP, a firm with substantial experience in the prosecution of shareholder and securities class actions to serve as lead counsel. DePaolo Decl., Ex. E. As recently noted by Your Honor:

While I recognize that each counsel is well qualified, I am particularly persuaded by [Block & Leviton's] experience in large securities class actions, such as its representation of plaintiffs in *In re BP Securities Litigation*, (S.D. Tex.), *In re Google Inc. Class C Shareholder Litig.* (Del. Ch. Ct.), and *In re Volkswagen "Clean Diesel" Marketing*,

*Sales and Products Liability Litigation (N.D. Cal.). I find the experience garnered from such representations will benefit the shareholder in this suit.*

*Thieffry v. Synchronoss Tech., Inc.*, No. 3:17-cv-07173-FLW-LHG (D.N.J. 2018) (ECF No. 21).

Accordingly, the Court should approve of Ms. Welkhammer's selection of Block & Leviton as Lead Counsel.

#### **IV. CONCLUSION**

For the foregoing reasons, Ms. Welkhammer respectfully requests that the Court: (i) appoint Ms. Welkhammer as Lead Plaintiff; (ii) approve of her selection of Block & Leviton LLP as Lead Counsel; and (iii) grant such other relief as the Court may deem just and proper.

Dated: October 13, 2020

Respectfully submitted,

*/s/ Audra DePaolo*

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