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Gary Eberhard*

**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.

Civil Action No.: 3:20-cv-10462-FLW-ZNQ

CLASS ACTION

Hon. Freda L. Wolfson  
Courtroom 5E

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

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Proposed Lead Plaintiff Gary Eberhard (“Movant”) respectfully submits this Memorandum of Law 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”), in support of Movant’s Motion for the entry of an Order: (i) appointing Movant as Lead Plaintiff on behalf of a class consisting of all persons other than Defendants who purchased or otherwise acquired Eastman Kodak Company (“Kodak” or the “Company”) securities between July 27, 2020 and August 7, 2020, both dates inclusive (the “Class Period”)<sup>1</sup>; (ii) approving Movant’s selection of Berger Montague PC (“Berger Montague”) as Lead Counsel and Calcaterra Pollack LLP (“Calcaterra Pollack”) as Local Counsel for the Class; and (iii) granting such other and further relief as the Court may deem just and proper.<sup>2</sup>

### **PRELIMINARY STATEMENT**

Movant respectfully submits that he should be appointed Lead Plaintiff on behalf of all investors who acquired Kodak securities during the Class Period (the “Class”) and who were damaged as a result of Defendants’ alleged fraud. This action (the “Action”) alleges violations of Sections 10(b) and 20(a) of the Exchange Act against Kodak, James Continenza (“Continenza”), its Executive Chairman and Chief Executive Officer (“CEO”), and David Bullwinkle (“Bullwinkle”), its Chief Financial Officer (“CFO”) (collectively, the “Defendants”).

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<sup>1</sup> Another class action lawsuit was filed on August 26, 2020 in the United States District Court for the Southern District of New York. *See McAdams et al. v. Eastman Kodak Company*, Civil Action No. 1:20-cv-6861 (S.D.N.Y.). The *McAdams* action alleges a longer Class Period of July 27, 2020 through and including August 11, 2020. As the *McAdams* action alleges substantially identical facts and claims as the instant Action, Movant anticipates that *McAdams* will be transferred to this Court and consolidated with this Action, or the two actions will be otherwise coordinated. Accordingly, if Movant is appointed Lead Plaintiff, he anticipates filing a consolidated amended complaint that alleges the most expansive Class Period in order to represent the greatest number of damaged shareholders and maximize the relief for the Class.

<sup>2</sup> A copy of Movant’s Certification pursuant to the PSLRA is attached as Exhibit A to the Declaration of Janine Pollack, Esq. (“Pollack Decl.”), submitted concurrently herewith.

The PSLRA requires that the Court 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 must determine which movant has the “largest financial interest” in the relief sought by the Class, and also whether such movant has made a *prima facie* showing that he is a typical and adequate Class representative under Rule 23 of the Federal Rules of Civil Procedure (“Rule 23”). *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I).

For the reasons stated herein, Movant respectfully submits that he is the “most adequate plaintiff” under the PSLRA and should be appointed Lead Plaintiff. On his Class Period transactions in Kodak securities, Movant Gary Eberhard incurred losses of \$73,811 on a first-in-first-out (“FIFO”) basis and \$79,693 on a last-in-first-out (“LIFO”) basis. Movant has the largest known loss of any other movant and a substantial financial interest in recovering losses attributable to Defendants’ violations of federal securities laws.

Further, Movant satisfies the typicality and adequacy requirements of Rule 23 in that: (i) Movant’s claims arise from the same course of conduct or events as those of the other Class members, (ii) Movant relies on similar legal theories to prove Defendants’ liability, and (iii) Movant has retained experienced counsel and is committed to vigorously prosecuting the claims.

Finally, pursuant to the PSLRA, Movant respectfully requests that the Court approve his selection of Berger Montague as Lead Counsel for the Class. *See* 15 U.S.C. § 78u-4(a)(3)(B)(v) (“[T]he most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class”). Berger Montague is a nationally recognized leader representing investors in shareholder litigation and securities class actions for nearly fifty years and has the expertise and resources necessary to handle this complex litigation.

Accordingly, Movant respectfully requests that the Court appoint him as Lead Plaintiff for the Class and approve his selection of Lead Counsel.

## FACTUAL BACKGROUND

Kodak, based in Rochester, New York, is a global technology company that provides products and services to customers in commercial print, packaging, publishing, manufacturing, and entertainment. In particular, Kodak manufactures products and provides services in the areas of digital print, functional print, traditional print, and consumer, professional, industrial motion picture films.

This lawsuit alleges that certain Kodak insiders perpetrated a scheme by which they profited from material non-public information – specifically, the imminent announcement of a transaction between Kodak and the U.S. International Development Finance Corporation (“DFC”) under the Defense Production Act whereby the DFC would loan Kodak \$765 million to manufacture and produce materials to treat COVID-19. Defendants arranged for stock options to be granted to them by the Company immediately prior to the announcement, and when news of the deal was disclosed, Kodak shares spiked, allowing Defendants to reap exorbitant profits.

On July 27, 2020, Kodak released a statement to local media outlets in Rochester that an announcement regarding a “new manufacturing initiative” involving the DFC and the response to COVID-19 was imminent. Immediately thereafter, Kodak claimed this information was released inadvertently. Unbeknownst to investors, *on the same day*, Kodak granted Defendant Continenza, Kodak’s CEO, more than 1.75 million stock options at a conversion price of between \$3.03 and \$12.00 per share. Three other Kodak executives, including the CFO, Defendant Bullwinkle, General Counsel Roger Byrd, and Vice-President Randy Vandagriff, were each awarded 45,000 stock options.

At the time the options were issued, Kodak shares were trading below the conversion price range. The following day, July 28, 2020, Kodak’s shares shot up approximately 200% – from a

close of \$2.62 per share on July 27 to a close of \$7.94 on July 28 – following news that Kodak had secured the \$765 million DFC loan. The surge continued the next day, July 29, 2020, as shares appreciated by approximately 300%. On July 29, 2020, Defendant Continenza was interviewed on CNBC’s Squawk Box during which he touted the loan and Kodak’s shift to producing the ingredients for COVID-19 drugs. Among other things, Defendant Continenza stated that he was “very comfortable that we can bank on [the Loan],” that the loan had been a “tight-kept secret” up until July 28, 2020, and that he had no explanation for the surge in trading volume from about 74,000 on Friday, July 24, 2020 to more than 1.64 million on Monday, July 27, 2020. The foregoing statements and others made by Mr. Continenza and others represented to investors that the \$765 million DFC loan was a done deal.

Within days, Defendants’ unlawful compensation scheme began to be revealed. On August 1, 2020, *Reuters* reported on an “unusual” 1.75 million option grant to Kodak’s CEO, Defendant Continenza, an award “that had previously neither been listed in his employment contract nor made public.” Kodak shares fell approximately 32% on that date. On August 4, 2020, Senator Elizabeth Warren sent a letter to U.S. regulators, including the U.S. Securities & Exchange Commission (“SEC”), requesting that U.S. regulators examine possible insider trading by certain Kodak insiders prior to Kodak’s July 28, 2020 announcement of the \$765 million DFC loan.

Finally, on August 7, 2020, the DFC announced that “[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.” On this news, Kodak’s stock price plummeted approximately 28% to close at \$10.73 per share, and investors suffered billions of dollars in losses.



## ARGUMENT

### **I. MOVANT SHOULD BE APPOINTED LEAD PLAINTIFF**

Movant respectfully submits that he should be appointed Lead Plaintiff because he filed the instant Motion in a timely manner, has a substantial if not the largest financial interest in this litigation, and satisfies the typicality and adequacy requirements of Rule 23.

#### **A. The PSLRA Standard for Appointing Lead Plaintiff**

The PSLRA provides a straightforward, sequential procedure for selecting a lead plaintiff for “each private action arising under [the Exchange Act] that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure.” *See* 15 U.S.C. § 78u-4(a)(1); *see also* 15 U.S.C. § 78u-4(a)(3)(B) (setting forth procedure for selecting lead plaintiff). First, Section 21D(a)(3)(A)(i) of the Exchange Act, as amended by the PSLRA, specifies that:

Not later than 20 days after the date on which the complaint 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 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).

Next, pursuant to the PSLRA, a court is to consider any motion made by class members to serve as Lead Plaintiff and appoint the “most adequate plaintiff.” 15 U.S.C. § 78u-4(a)(3)(B)(i). In adjudicating a lead plaintiff motion, a court shall adopt a presumption that the “most adequate plaintiff” is the person or group of persons who: (i) filed a complaint or timely filed a motion to serve as Lead Plaintiff; (ii) has the largest financial interest in the relief sought by the class; and

(iii) who otherwise satisfies the requirements of Rule 23. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). This presumption may be rebutted only by “proof” 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); *see also In re Party City Sec. Litig.*, 189 F.R.D. 91, 104 (D.N.J. 1999); *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 121 (D.N.J. 2002); *In re Cendant Corp. Litig.*, 182 F.R.D. 479 (D.N.J. 1998). Under the criteria established by the PSLRA, Movant is the most adequate plaintiff and should be appointed Lead Plaintiff.

**B. Movant Is The “Most Adequate Plaintiff”**

**1. Movant’s Motion Is Timely**

Movant has timely filed this Motion to serve as Lead Plaintiff. Pursuant to 15 U.S.C. § 78u-4(a)(3)(A)(i), the plaintiff in the above-captioned action caused notice regarding the pending nature of this case to be published on *Globe Newswire*, a widely-circulated, business-oriented news wire service, on August 14, 2020. *See* Notice, Pollack Decl., Ex. B. Thus, pursuant to the PSLRA, any person who is a member of the proposed Class may apply to be appointed lead plaintiff within sixty days after publication of the notice, *i.e.*, on or before October 13, 2020. Movant filed this Motion seeking appointment as Lead Plaintiff within this deadline and thus has satisfied the procedural requirements of the PSLRA.

**2. Movant Has A Substantial Financial Interest**

The PSLRA requires a court to adopt the 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 re Cendant Corp. Litig.*, 264 F.3d 201, 223 (3d Cir. 2001); *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 192 (3d Cir. 2005).

Movant Eberhard has incurred substantial losses of \$73,811 on a first-in-first-out (“FIFO”) basis and \$79,693 on a last-in-first-out (“LIFO”) basis on his Class Period transactions in Kodak securities. *See* Loss Analysis, Pollack Decl., Ex. C; *Party City Sec. Litig.*, 189 F.R.D. at 105 (finding the movant with the largest financial interest to be the presumptive “most adequate plaintiff”). Accordingly, Movant has a substantial financial interest in the outcome of the litigation and is presumptively the “most adequate plaintiff.” *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii); *In re Milestone Scientific Sec. Litig.*, 183 F.R.D. 404, 413 (D.N.J. 1998).

### **3. Movant Satisfies Rule 23’s Typicality and Adequacy Requirements**

The PSLRA further provides that in addition to possessing the largest financial interest in the outcome of the litigation, a lead plaintiff must “otherwise satisf[y] the requirements of Federal Rule of Civil Procedure 23.” *See City of Warren Gen. Emps. Ret. Sys. v. Celgene Corp.*, No. 18-4772, 2018 WL 4629570, at \*1 (D.N.J. Sept. 26, 2018); *In re Able Labs. Sec. Litig.*, 425 F. Supp. 2d 562, 567 (D.N.J. 2006). At the lead plaintiff selection stage, all that is required to satisfy Rule 23 is a preliminary showing that the lead plaintiff’s claims are typical and adequate. *See Party City Sec. Litig.*, 189 F.R.D. at 106; *see also Kux-Kardos v. VimpelCom, Ltd.*, 151 F. Supp. 3d 471, 477 (S.D.N.Y. 2016). Here, Movant satisfies both requirements.

#### **a. Movant’s Claims Are Typical of Those of the Class**

The Rule 23(a) typicality requirement is satisfied when a plaintiff’s claims arise from the same event, practice or course of conduct that gives rise to other class members’ claims, and plaintiff’s claims are based on the same legal theory. *See In re Merck & Co., Inc. Sec., Derivative & “ERISA” Litig.*, No. 05-cv-1151, 2013 WL 396117, at \*5 (D.N.J. Jan. 30, 2013). Rule 23 does not require the lead plaintiff to be identically situated with all class members. *See id.* at \*7.

Movant’s claims are typical of the claims asserted by the proposed Class. Like all members

of the Class, Movant alleges that Defendants made material misstatements and omissions relating to the \$765 million DFC loan and the granting of Kodak stock options to certain Kodak executives in violation of the federal securities laws. Like all the members of the Class, Movant purchased Kodak securities in reliance on Defendants' public statements, including their alleged misrepresentations and omissions, and was damaged thereby. Because Movant's claims arise from the same course of conduct or events as the claims of all other Class members, the typicality requirement is satisfied. *See In re Nice Sys. Sec. Litig.*, 188 F.R.D. 206, 218 (D.N.J. 1999).

**b. Movant Satisfies the Adequacy Requirement of Rule 23**

In addition, Movant satisfies the adequacy requirement of Rule 23. The adequacy of representation requirement of Rule 23(a)(4) is satisfied when a representative party establishes that it "will fairly and adequately protect the interests of the class."

Courts in this District have determined that 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 WL 31056813, at \*6 (D.N.J. Apr. 17, 2002).

Here, Movant will fairly and adequately represent the interests of the proposed Class. Movant Eberhard has the necessary resources and motivation to pursue the above-captioned action to a successful conclusion, and he is committed to pursuing the best recovery possible for himself and all other Class members. Movant incurred substantial losses and thus is highly motivated to maximize any recovery. Movant also has selected and retained experienced counsel, Berger Montague, with a nearly fifty-year record of prosecuting securities class actions vigorously and

efficiently, *see infra* Section II. Movant has timely submitted his choice to the Court for approval, in accordance with the PSLRA. *See* 15 U.S.C. §§ 78u-4(a)(3)(A)(i)(II) & (B)(v).

Furthermore, no antagonism exists between Movant’s interests and those of the absent Class members. Rather, they are aligned. Like all other Class members, Movant suffered substantial losses due to Defendants’ alleged misconduct and, therefore, has a sufficient and identical interest in the outcome of this case to ensure vigorous prosecution of the litigation for the benefit of all Class members.

Finally, there is no evidence to suggest that Movant is “subject to unique defenses that render such plaintiff incapable of representing the class,” because no such evidence exists. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II). Accordingly, Movant satisfies the adequacy requirement.

Thus, Movant clearly satisfies the requirements of the PSLRA for lead plaintiff appointment and should be appointed Lead Plaintiff on behalf of the putative Class of damaged Kodak investors here.

## **II. MOVANT’S SELECTION OF LEAD COUNSEL MERITS APPROVAL**

The PSLRA vests authority in the lead plaintiff to select and retain lead counsel, subject to the court’s approval. *See* 15 U.S.C. § 78u-4(a)(3)(B)(v); *Cendant*, 264 F.3d at 276 (stating that “the [PSLRA] evidences a strong presumption in favor of approving a properly-selected lead plaintiff’s decisions as to counsel selection and counsel retention”). Consistent with Congressional intent, a court should not disturb the lead plaintiff’s choice of counsel unless it is “necessary to protect the interests of the plaintiff class.” H.R. Conf. Rep. No. 104-369, at 35 (1995), *as reprinted in* 1995 U.S.C.C.A.N. 730, 734.

Here, Movant has selected the law firm of Berger Montague to represent the Class. Berger Montague has a long record of success in securities litigation and has achieved many of the largest

securities recoveries since Congress enacted the PSLRA. The Firm advises clients on litigation and recovery options in securities proceedings throughout the United States and internationally. Berger Montague has served as lead or co-lead counsel in numerous other major securities class action cases, both within this District and beyond, where substantial settlements were achieved on behalf of investors, including: *In re Merrill Lynch Securities Litigation* (S.D.N.Y.) (recovery of \$475 million); *In re Sotheby's Holding, Inc. Securities Litigation* (S.D.N.Y.) (a \$70 million settlement, of which \$30 million was contributed, personally, by an individual defendant); *In re KLA Tencor Securities Litigation* (N.D. Cal.) (settlement of \$65 million); *In re CIGNA Corp. Securities Litigation* (E.D. Pa.) (settlement of \$93 million); and *In re Rite Aid Corp. Securities Litigation* (E.D. Pa.) (settlements totaling \$334 million). See Berger Montague Firm Resume, Pollack Decl., Ex. D.

In addition, Movant has selected the law firm of Calcaterra Pollack LLP (“Calcaterra Pollack”) to serve as Local Counsel. Calcaterra Pollack is a women-owned and women-run firm specializing, among other things, in securities, antitrust and consumer class actions. Its partners have over five decades of collective experience in complex federal and state litigation including experience representing individual and institutional investors in federal and state securities litigation, and on matters of corporate governance and shareholder rights. Calcaterra Pollack currently serves as Co-Counsel on the Lead Counsel team representing New York’s Metropolitan Transportation Authority’s pension funds as lead plaintiffs in *In re Molson Coors Brewing Company Securities Litigation*, Case No. 1:19-cv-00455-DME-MEH (D. Colo.), a securities class action in which defendants allegedly misled investors by misstating the company’s tax liability by almost \$248 million in financial filings. See Calcaterra Pollack Firm Resume, Pollack Decl., Ex. E.

In light of the foregoing, by approving Movant’s selection of Berger Montague as Lead

Counsel for the Class, the Court can be assured that the Class will receive the highest quality representation. Thus, the Court should approve this selection.

**CONCLUSION**

For the foregoing reasons, Movant respectfully requests that the Court grant his Motion and enter an Order: (i) appointing Movant Gary Eberhard as Lead Plaintiff; (ii) approving Movant's selection of Berger Montague as Lead Counsel and Calcaterra Pollack LLP as Local Counsel for the Class; and (iii) granting such other and further relief as the Court may deem just and proper.

Dated: October 13, 2020

Respectfully submitted,

/s/ Janine Pollack

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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/ Janine Pollack  
Janine Pollack