

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK**

In re EASTMAN KODAK COMPANY
SECURITIES LITIGATION

Honorable Elizabeth A. Wolford
DOCKET NO.: 6:21-cv-6418-EAW

**CERTAIN OUTSIDE DIRECTOR DEFENDANTS'
REPLY MEMORANDUM IN FURTHER SUPPORT OF MOTION TO DISMISS
THE CONSOLIDATED CLASS ACTION COMPLAINT**

KING & SPALDING LLP

Paul A. Straus, Esq.
Eric A. Hirsch, Esq.
Alexander Noble, Esq.
1185 Avenue of the Americas
New York, NY 10036

*Attorneys for Defendants Jason New
and William Parrett*

LATHAM & WATKINS LLP

Christopher J. Clark, Esq.
Michael S. Bosworth, Esq.
Zachary L. Rowen, Esq.
1271 Avenue of the Americas
New York, New York 10020

*Attorneys for Defendant Richard
Todd Bradley*

BAKER & HOSTETLER LLP

Eric R. Fish, Esq.
45 Rockefeller Plaza
New York, NY 10111

Jonathan R. Barr, Esq. (*pro hac vice*)
1050 Connecticut Avenue, NW
Suite 1100
Washington, DC 20036

*Attorneys for Defendant Jeffrey
Engelberg*

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
ARGUMENT.....	1
I. PLAINTIFFS' SCHEME LIABILITY CLAIM AGAINST THE BENP OUTSIDE DIRECTORS FAILS.	1
A. Plaintiffs Fail to Allege Inherently Deceptive Conduct Against the BENP Outside Directors.....	2
B. Plaintiffs Fail to Plead Scienter Against the BENP Outside Directors.....	3
CONCLUSION.....	4

TABLE OF AUTHORITIES**Page(s)****Cases**

<i>In re Acadia Dairies, Inc.</i> , 15 Del. Ch. 248 (1927).....	2
<i>In re Braskem S.A.</i> , 246 F. Supp. 3d 731 (S.D.N.Y. 2017).....	4
<i>Buxbaum v. Deutsche Bank</i> , 2000 WL 33912712 (S.D.N.Y. Mar. 7, 2000).....	4
<i>In re CRM Holdings, Ltd. Sec. Litig.</i> , 2012 WL 1646888 (S.D.N.Y. May 10, 2012).....	3
<i>In re Forest Laboratories</i> , 450 F. Supp. 2d 379 (S.D.N.Y. 2006).....	4
<i>La. Pac. Corp. v. Money Mkt. I Institutional Inv. Dealer</i> , 851 F. Supp. 2d 512 (S.D.N.Y. 2012).....	3
<i>SEC v. China Northeast Petrol</i> , 27 F. Supp. 3d 379 (S.D.N.Y. 2014).....	2
<i>SEC v. Collins & Aikman Corp.</i> , 524 F. Supp. 2d 477 (S.D.N.Y. 2007).....	3
<i>Town of Davie Police Officers Ret. Sys. v. City of N. Miami Beach Police Officers' & Firefighters' Ret. Plan</i> , 2021 WL 5142702 (2d Cir. Nov. 5, 2021).....	3

Defendants Bradley, Engelberg, New and Parrett (the “BENP Outside Directors”) submit this reply in support of Defendants’ motion to dismiss the Class Action Complaint (“CAC”).

PRELIMINARY STATEMENT

At its core, Plaintiffs’ Opposition (“Opp.”) repeats their sweeping allegations that *all* Defendants engaged in an unlawful “scheme,” but confirms that the BENP Outside Directors’ sole alleged conduct consists of attending a July 27, 2020 board meeting, where (i) the BENP Outside Directors voted to approve the LOI, and (ii) Defendants Bradley and New allegedly approved the options. This cannot support liability against the BENP Outside Directors. Plaintiffs attempt to salvage Counts II and III by doubling down on their improper use of group pleading, but Count II fails because the CAC does not allege either individual acts of deception or scienter against the BENP Outside Directors, and Count III similarly fails for lack of their alleged culpable participation in, much less control over, the alleged primary violations.¹

ARGUMENT

I. PLAINTIFFS’ SCHEME LIABILITY CLAIM AGAINST THE BENP OUTSIDE DIRECTORS FAILS.

Plaintiffs incorrectly argue that the CAC’s numerous blanket statements accusing all “Defendants” of misconduct serve merely “as a way to summarize the actions of more than one Individual Defendant,” and that such individualized allegations can be found “in the surrounding paragraphs of the CAC.” Opp. 55. There are no such allegations against the BENP Outside Directors, however. Although Plaintiffs direct the Court to CAC paragraphs 36-42 and 139-46 for the supposed “specific allegations pertaining to Individual Defendants,” (Opp. 55), those paragraphs do not contain a single allegation about the BENP Outside Directors.

¹ As argued in Point VI of the Main Reply Brief, in which the BENP Outside Directors join, the CAC does not allege that the BENP Outside Directors had any involvement in or control over the alleged misstatements and omissions that form the basis of Plaintiffs’ claims.

Indeed, the Opposition confirms that the BENP Outside Directors are not alleged to have (i) made or approved any alleged misstatements (Opp. 55 n.35), (ii) received any options or stood personally to benefit from the alleged scheme (Opp. 46, 47), or (iii) engaged in any stock trades (Opp. 25). Given these concessions, Plaintiffs are forced to retreat to the position that “the only factual predicate needed to establish their participation in the options granting scheme” are the BENP Outside Directors’ “names” and membership on “the Kodak Board and CNG Committee.” Opp. 55. Of course, as shown in the next section, that is not correct.

A. Plaintiffs Fail to Allege Inherently Deceptive Conduct Against the BENP Outside Directors.

Confronted with the utter lack of factual allegations against the BENP Outside Directors, Plaintiffs attempt to rewrite the securities laws by arguing, incorrectly, that they are not required to allege that the BENP Outside Directors individually engaged in any inherently deceptive conduct. Opp. 64-66. But Plaintiffs’ own authorities hold that they must plead that each individual defendant “perform[ed] an inherently deceptive act that is distinct from an alleged misstatement.” *SEC v. China Northeast Petrol*, 27 F. Supp. 3d 379, 392 (S.D.N.Y. 2014).²

Plaintiffs fail to cite a single case supporting their contention that the BENP Outside Directors’ approval of either the LOI or the options qualifies as an inherently deceptive act.³ To

² In each case Plaintiffs cite where scheme claims survived dismissal, the defendants were alleged to have engaged both in material misstatements and inherently deceptive conduct (*see* Main Reply Br. III.A), whereas the BENP Outside Directors are not alleged to have engaged in either. *SEC v. Sason* does not hold, as Plaintiffs contend, that defendants can be liable “even if ‘neither Defendant engaged in any deceptive or manipulative conduct’” (Opp. 66). There, the court upheld the claim only because it found that the complaint adequately pled that the defendants “engaged in deceptive conduct that contributed to the larger scheme.” 433 F. Supp. 3d 496, 509 (S.D.N.Y. 2020).

³ Mr. Bradley left the meeting where the options were approved early and did not cast a vote in favor of the options. Main Reply Br. 32 n.44. It is also irrelevant that Mr. Bradley gave Mr. Katz a “proxy” (Opp. 72 n.46)—it is axiomatic that “directors of a corporation cannot act by proxy.” *In re Acadia Dairies, Inc.*, 15 Del. Ch. 248, 250 (1927).

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.