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

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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).

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