

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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In re EASTMAN KODAK COMPANY  
SECURITIES LITIGATION.

**DECISION AND ORDER**

6:21-CV-6418 EAW

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**INTRODUCTION**

This action arises out of the events surrounding a Letter of Interest (“LOI”) entered into between defendant Eastman Kodak Company (“Kodak”) and the United States International Development Finance Corporation (“DFC”) in July of 2020, discussing a contemplated loan of \$765 million from DFC to Kodak to support the conversion of Kodak’s manufacturing facilities to produce pharmaceutical products. It consists of two matters transferred to this District and consolidated for all purposes into a single action denominated “In re Eastman Kodak Company Securities Litigation.” (Dkt. 89).

In the consolidated class action complaint, Lead Plaintiffs Les Investissements Kiz Inc. (“Kiz, Inc.”) and UAT Trading Service, Inc. (“UAT”) (collectively “Plaintiffs”) allege violations of federal securities laws by defendants Kodak, Kodak’s Executive Chairman and CEO James V. Continenza (“Continenza”), CFO David Bullwinkle (“Bullwinkle”), General Counsel Roger W. Byrd (“Byrd”), director Philippe D. Katz (“Katz”), director Richard “Todd” Bradley (“Bradley”), director Jason New (“New”), director Jeffrey Engelberg (“Engelberg”), director William G. Parrett (“Parrett”), and director George Karfunkel (“Karfunkel”) (collectively “Defendants”). (Dkt. 116).

Presently before the Court is a joint motion filed by Defendants seeking dismissal of the consolidated class action complaint for failure to state a claim upon which relief may be granted. (Dkt. 159). For the reasons that follow, Defendants' motion is granted in its entirety.

## **BACKGROUND**

### **I. Factual Background**

The following facts are taken from the consolidated class action complaint. (Dkt. 116). As is required at this stage of the proceedings, the Court treats Plaintiffs' factual allegations as true.

Plaintiffs commenced this putative federal securities class action against Kodak, an internationally recognized company known primarily for its photography and film manufacturing business, on behalf of certain purchasers of Kodak securities. (*Id.* at ¶ 43). Following bankruptcy proceedings in 2012, Kodak began expanding its business by focusing on commercial products and digital printing. (*Id.*).

In the spring of 2020, during the emergence of the COVID-19 pandemic, the United States government began exploring the possibility of obtaining assistance from domestic companies qualified to provide products and services to help fight COVID-19. (*Id.* at ¶ 45). Specifically, on May 14, 2020, then-President Donald Trump issued an executive order which permitted the DFC to issue loans to domestic companies capable of providing strategic resources responsive to the COVID-19 outbreak. (*Id.* at 46).

In response to the White House announcement, Kodak dedicated resources to explore its ability to produce chemical ingredients used in the manufacture of drugs

designed to combat COVID-19, including hydroxychloroquine. (*Id.* at ¶ 47). The prospect of a lucrative government loan caused Kodak's stock price to rise from the \$2 range, where it sat in the spring of 2020. (*Id.*).

Kodak designated the new project with the code name "Project Tiger" to maintain its confidentiality. (*Id.* at ¶ 49). Individuals on the Project Tiger clearance list included Continenza, Byrd, and three dozen Kodak employees. (*Id.*). On June 18, 2020, Kodak emailed all Project Tiger team members informing them of their status on the clearance list and warning them that knowledge of the project could be considered material non-public information ("MNPI"). (*Id.* at ¶¶ 52, 53). The internal memo warned members against trading in Kodak stock while in possession of MNPI and directed them to pre-clear any trade transaction with Byrd. (*Id.* at ¶ 53).

On June 23, 2020, Continenza purchased 46,737 shares of Kodak stock at an average price of \$2.22 a share and Katz purchased 5,000 shares at the same average price. (*Id.* at ¶ 54). The purchases by Continenza and Katz occurred on the last day of an open window trading period which permitted Kodak insiders to transact in Kodak stock so long as they were not in possession of MNPI or in violation of Kodak's insider trading policy. (*Id.* at ¶ 54). Three days later on June 26, 2020, Kodak submitted its loan package to the DFC. (*Id.* at ¶ 55).

On July 8, 2020, Kodak was informed that DFC representatives wanted to conduct a site visit at Kodak headquarters. (*Id.* at ¶ 56). On July 22, 2020, DFC officials toured the Kodak facility and met with Kodak executives, including Continenza and Bullwinkle. (*Id.* at ¶ 57). During the visit, Kodak learned that DFC would enter into an LOI with Kodak

regarding the potential loan and that the LOI would be announced in a press release on July 28, 2020. (*Id.*). Before the announcement, DFC sent Kodak a draft term sheet identifying the terms of the \$765 million loan but making clear it was for discussion purposes only. (*Id.* at ¶ 58). Correspondence between Kodak and DFC explicitly noted that the LOI was subject to a comprehensive review and approval process requiring due diligence. (*Id.* at ¶ 59). The LOI also expressly stated that DFC would not enter into any commitments until the process was completed satisfactorily and that the letter was not and could not be deemed an agreement or commitment by DFC to provide support for the project. (*Id.* at ¶ 60).

The day before the LOI was scheduled to be announced, Continenza and Byrd convened a meeting of Kodak's Board of Directors and its Compensation, Nominating and Governance Committee<sup>1</sup> ("CNG Committee") to notify them of the LOI prior to the DFC announcement and to seek approval for granting "spring-loaded" stock options to certain members of Kodak's senior management, including Continenza, Bullwinkle, and Byrd. (*Id.* at ¶ 62). The options granted these Defendants the right to purchase Kodak shares at a pre-arranged strike price that would be worth millions if the stock price surged. (*Id.* at ¶ 63).

On the same day, July 27, 2020, Kodak leaked information to the press concerning the July 28th announcement. (*Id.* at ¶ 67). Just after noon on that day, local news reporters in Rochester, New York, began tweeting information about a Kodak initiative to manufacture products to help create medicines used to fight COVID-19. (*Id.* at ¶ 68). One

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<sup>1</sup> The CNG Committee was composed of Bradley, Katz, and New.

local television news reporter tweeted, “Kodak tells @13WHAM we should expect an announcement soon with senior U.S. govt officials regarding a new manufacturing initiative that ‘could change the course of history for Rochester and the American people.’ No more details released but wow, that’s quite a promise.” (*Id.* (citation omitted)).

Following the leak, the price of Kodak’s shares increased and closed at \$2.62 a share, but opened the following morning at \$9.63 a share, representing a nearly 370% overnight increase. (*Id.* at ¶ 70). On July 28, 2020, at 6:00 a.m. and before the market opened, the *Wall Street Journal* published an article which stated that Kodak was awarded a \$765 million government loan to expedite domestic production of drugs needed to combat the COVID-19 pandemic. (*Id.* at ¶ 71). Continenza was quoted in the article as indicating that Kodak would produce key starter materials and active pharmaceutical ingredients and “expects the loan to create around 300 jobs in Rochester, and 30 to 50 in Minnesota.” (*Id.*).

At approximately 9:00 a.m. on July 28, 2020, just before the market opened, the DFC issued a statement confirming the contemplated deal for the \$765 million loan to Kodak. (*Id.* at ¶ 73). The statement quoted Continenza as stating, “[b]y leveraging our vast infrastructure, deep expertise in chemicals manufacturing, and heritage of innovation and quality, Kodak will play a critical role in the return of a reliable American pharmaceutical supply chain.” (*Id.* ). Kodak’s shares rose to an intra-day high of \$11.80 per share and closed at \$7.94 per share. (*Id.* at ¶ 74).

The following day, Continenza appeared on several interviews with financial news media. (*Id.* at ¶ 78). In an interview with CNBC, Continenza was asked if this was a “done deal,” and Continenza replied, “[w]ell, we feel very comfortable that we can bank on it,”

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