

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----- X

In the Matter of the Inquiry by LETITIA JAMES,
Attorney General of the State of New York,

Index No.:

Petitioner,

Pursuant to Article 23-A of the New York General
Business Law in regard to the acts and practices of

EASTMAN KODAK COMPANY and JAMES V.
CONTINENZA,

Respondents,

in promoting the issuance, distribution, exchange,
advertisement, negotiation, purchase, investment advice
or sale of securities in or from New York State.

----- X

**MEMORANDUM OF LAW IN SUPPORT OF THE ATTORNEY GENERAL'S
EX PARTE APPLICATION FOR AN ORDER
PURSUANT TO GENERAL BUSINESS LAW § 354**

LETITIA JAMES
Attorney General of the State of New York
28 Liberty Street
New York, New York 10005

Petitioner

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. PRELIMINARY STATEMENT	1
II. STATEMENT OF FACTS	3
A. OAG’s Investigation	3
B. Kodak Applies for a Government Loan to Launch a Pharmaceuticals Business and Gives the Project a Confidential Code Name – “Project Tiger”	3
C. Continenza Purchases Kodak Securities	7
D. At the Time of Continenza’s Stock Purchase, Project Tiger was Confidential, Non-Public, and Material	9
E. Kodak Secures a Letter of Interest	10
F. The Letter of Interest is Disclosed to the Market, and Kodak’s Share Price Skyrockets	11
G. Kodak Falsely Claims that Continenza’s Trading Complied With Its Insider Trading Policy	12
H. OAG Determines to Commence a Proceeding and Seeks Relief Under GBL § 354	15
III. LEGAL STANDARDS	16
IV. ARGUMENT	17
A. The Attorney General Has Determined to Bring a Martin Act Action Against Continenza and Kodak	17
B. The Documents and Testimony Sought are Material and Necessary	19
V. OAG’S REQUESTED RELIEF	20
VI. CONCLUSION	20

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgt. Inc.</i> , 18 N.Y.3d 341 (2011)	16
<i>Diamond v. Oreamuno</i> , 24 N.Y.2d 494 (1969)	18
<i>Matter of Attorney-General (Amer. Rsch. Council)</i> , 10 N.Y.2d 108 (1961)	17
<i>Ottinger v. State Civil Serv. Comm'n</i> , 240 N.Y. 435 (1925)	17, 19
<i>People v. 7040 Colonial Rd. Assocs. Co.</i> , 176 Misc. 2d 367 (N.Y. Sup. Ct. 1998)	2, 16
<i>People v. Cadplaz Sponsors, Inc.</i> , 330 N.Y.S. 2d 430 (N.Y. Sup. Ct. 1972)	18
<i>People v. Credit Suisse Sec.</i> , 31 N.Y.3d 622 (2018)	18, 19
<i>People v. Federated Radio Corp.</i> , 244 N.Y. 33 (1926)	17
<i>People v. Florentino</i> , 456 N.Y.S.2d 638 (N.Y. Crim. Ct. 1982)	18
<i>People v. iFinex</i> , 185 A.D.3d 22 (1st Dep't 2020)	2, 16
<i>People v. Justin</i> , 779 N.Y.S.2d 717 (N.Y. Sup. Ct. 2003)	17, 19
<i>People v. Lexington Sixty-First Assocs.</i> , 38 N.Y.2d 588 (1976)	17, 18
<i>People v. Napolitano</i> , 282 A.D.2d 49 (1st Dep't 2001)	18
<i>SEC v. Tome</i> , 638 F. Supp. 596 (S.D.N.Y. 1986)	19

TABLE OF AUTHORITIES (cont'd)

	Page(s)
STATE STATUTES	
General Business Law	
§ 352.....	2, 16, 17
§ 354.....	<i>passim</i>
The Martin Act.....	<i>passim</i>

Petitioner Letitia James, Attorney General of the State of New York (the “Attorney General” or “OAG”), respectfully submits this memorandum of law and the accompanying affirmation of Jeffrey A. Novack (“Novack Affirmation” or “Novack Aff.”), dated June 1, 2021, in support of an *ex parte* application pursuant to General Business Law (“GBL”) § 354.

Respondent Eastman Kodak Company (“Kodak” or the “Company”) is based in Rochester, New York, is publicly traded on the New York Stock Exchange under the symbol “KODK,” and has investors who reside in New York. Novack Aff. ¶ 7.

Respondent James V. Continenza is the Chief Executive Officer (“CEO”) and Executive Chairman of Kodak. Continenza has been CEO of Kodak since February 2019. *Id.* ¶ 8.

This application seeks the production of documents from Kodak, Continenza, and other senior Kodak management. It also seeks public examinations before a New York Supreme Court Justice or designated Referee of Continenza and Kodak’s General Counsel Roger Byrd.

I. PRELIMINARY STATEMENT

Public company executives, like Kodak’s CEO, are subject to a simple rule: they may not trade on inside information concerning their companies. Continenza broke that rule.

Continenza bought Kodak stock on June 23, 2020, shortly after Kodak had filed a non-public application for a \$655 million loan from the federal government, following extensive dealings with the White House and other federal officials, all of which were confidential.

Later, amidst public scrutiny of the potential loan and during the Attorney General’s investigation, Kodak falsely stated in two separate public filings with the Securities and Exchange Commission (“SEC”), less than two days before Kodak’s annual meeting of shareholders, that Continenza had followed Kodak’s insider trading policy to obtain pre-clearance of his trading. He did not.

Consequently, the Attorney General has determined to commence an action against Respondents Kodak and Continenza for participating in fraudulent practices in violation of the Martin Act (GBL § 352), New York's securities fraud statute. Having made that determination, and pursuant to GBL § 354, the Attorney General seeks, before initiating a civil proceeding, to publicly examine Respondent Continenza and Kodak's General Counsel before a Justice of the New York Supreme Court or designated Referee and to require the production of certain documents related to Respondents' fraudulent practices.

The New York General Business Law permits the Attorney General to investigate Martin Act securities fraud violations "either through confidential investigations conducted under compulsion of subpoena" under GBL § 352 "or through public [court-supervised] investigations conducted pursuant to court order" under GBL § 354. *People v. 7040 Colonial Rd. Assocs. Co.*, 176 Misc. 2d 367, 370 (N.Y. Sup. Ct. 1998). For public investigations under GBL § 354, the statute "permits the Attorney General to seek an *ex parte* order in Supreme Court requiring the subjects of an investigation to produce documents and testify under oath." *People v. iFinex*, 185 A.D.3d 22, 26 (1st Dep't 2020). As the First Department stated just last year, an order directing public investigation under GBL § 354 may "simply [be] the next step in [the Attorney General's] investigation of respondents, who [are] well aware of" the investigation and "cooperating with it." *Id.* at 33.

Here, the Attorney General has determined that the next appropriate investigative step is to examine witnesses publicly under oath before a Justice of the New York Supreme Court or designated Referee and to demand production of documents. Thus, the Attorney General seeks an order pursuant to GBL § 354 in the accompanying Proposed Order.

II. STATEMENT OF FACTS

Below we detail the relevant facts, which are drawn from the accompanying Novack Affirmation.

A. **OAG's Investigation**

The Attorney General is investigating Respondents Kodak and Continenza for fraudulent practices under the Martin Act. The Attorney General commenced a non-public investigation of Respondents following the July 28, 2020 announcement that Kodak had signed a letter of interest with the federal government for a \$765 million loan (hereinafter, "Letter of Interest"), one month after Continenza purchased Kodak securities on the open market. Novack Aff. ¶ 9.

B. **Kodak Applies for a Government Loan to Launch a Pharmaceuticals Business and Gives the Project a Confidential Code Name – "Project Tiger."**

Continenza's stock purchase and the Letter of Interest arose in the context of the Covid-19 pandemic. As the pandemic took hold in the United States in the spring and summer of 2020, domestic shortages of the chemical building blocks used to manufacture pharmaceuticals became apparent, and the federal government began searching for private partners with manufacturing facilities in the United States. *Id.* ¶ 10.

This presented an opportunity for Kodak, which operates a specialty chemicals business along with its well-known print and film businesses. In pursuit of that opportunity, beginning in March 2020, Kodak sought a federal government grant or loan in order to convert its manufacturing facilities to produce the chemicals that are used to create medicines. *Id.* ¶ 11.

This would have been a major undertaking. Kodak's principal business was in print and film, and it had only a limited capability to manufacture these chemicals at the time. In addition, even before the onset of the Covid-19 pandemic, Kodak was facing a cash crunch, which resulted in pay reductions and furloughs. *Id.* ¶ 12.

Consistent with Kodak's practice for important and sensitive projects, like a potential acquisition, disposition, or significant financing, Kodak gave the project a code name – "Project Tiger" – to maintain its confidentiality. *Id.* ¶ 13.

Kodak executives were assisted in their efforts by the CEO of Phlow Corporation ("Phlow"), a pharmaceutical company based in Richmond, Virginia. Kodak was introduced to Phlow in March 2020 by the Biomedical Advanced Research and Development Authority. Throughout the rest of March 2020 (and beyond), Phlow's CEO worked with Continenza and Kodak on how to navigate the process of obtaining a federal government grant or loan. *Id.* ¶ 14.

In April 2020, Continenza and Kodak began discussions about securing federal funding for Kodak's efforts directly with Peter Navarro, Director of the White House Office of Trade and Manufacturing, and his deputy. *Id.* ¶ 15.

Throughout May 2020, Continenza and Kodak worked to prepare funding proposals and provide information to Navarro's office. An internal Kodak document reports that Kodak employees worked "24/7" and "around the clock" to satisfy requests from Navarro. *Id.* ¶ 16.

At the end of May 2020, Kodak engaged EverGlade Consulting as a technical consultant to assist in securing a government loan. In connection with the application, Kodak incurred more than \$350,000 in fees for EverGlade's work during the month of June 2020 alone. *Id.* ¶ 17.

Then, on June 1, 2020, Navarro's deputy connected Kodak with the U.S. International Development Finance Corporation ("DFC"). The DFC had been given the authority the prior month to make loans in order to improve supply chains and domestic production of strategic resources in response to the Covid-19 pandemic. In a text thread among Continenza, Kodak's Chief Financial Officer ("CFO"), and Kodak's General Counsel that day, Kodak's General Counsel noted that the process was "[m]oving fast." Following this introduction, Continenza and

Kodak began working with senior DFC officials on a loan application. *Id.* ¶ 18.

On June 9, 2020, Kodak's Chief Technical Officer ("CTO") emailed a colleague with an update on the team's work. Kodak's CTO reported that "[it] is going well. Last week, Kodak team delivered a detailed, 50 page plan for the R&D / manufacturing platform required to build a US based pharma mfg base. Working on business plans/ market data/ funding options. Lots to do here." *Id.* ¶ 19.

On June 11, 2020, Kodak's Managing Director of Corporate Development directed another Kodak employee to "create a new project clearance list for Project Tiger." She described the project as "a highly confidential project." Continenza and Kodak's General Counsel were included on the Project Tiger clearance list, as well as three dozen other Kodak employees. *Id.* ¶ 20.

On June 12, 2020, Kodak's CTO sent Continenza and Kodak's CFO a PowerPoint deck titled "Project Tiger: Application for DFC-DPA Loan Program (DFC-014)" with a draft timeline projecting the following: the loan application would be submitted on June 26, 2020; the loan application would be finalized during the end of June 2020; a letter of interest with the federal government would be signed in mid-July 2020; and the loan would be awarded to Kodak in mid-August 2020. *Id.* ¶ 21.

The PowerPoint deck identified nine different project workstreams. It listed the "Executive Review and Management" team as including Continenza, Kodak's CFO, Kodak's CTO, and Kodak's General Counsel. It identified Kodak's CTO and other senior Kodak officials as part of the "Core" "day-to-day" team. *Id.* ¶ 22.

On June 15, 2020, Kodak and Phlow signed a letter of intent for Phlow to purchase chemicals from Kodak. In May 2020, the federal government had awarded Phlow a four-year contract valued at \$812 million to lead a team of private industry manufacturers to produce the

supplies for medicines for patients hospitalized with Covid-19. *Id.* ¶ 23.

In a cover letter enclosing the letter of intent, Kodak’s CTO explained that the letter of intent “reflects the conversations with the WH [White House] and with the DFC on achieving this US-based manufacturing solution.” The letter continued: “Recently, these discussions have highlighted the necessity for Phlow and Kodak to formalize their intent with a supply agreement that enables this manufacturing solution and provides part of the basis for a DFC loan to fund Kodak’s proposal.” *Id.* ¶ 24.

That same day, Kodak’s CFO was asked by a colleague whether the CFO was “optimistic?” Kodak’s CFO responded, “Optimistic yes!” *Id.* ¶ 25.

Then, on June 16, 2020, following additional discussions with senior DFC officials and Navarro’s deputy, Kodak applied to the DFC for a loan of \$655 million. *Id.* ¶ 26.

The next day, June 17, 2020, Continenza texted his administrative assistant: “I’ve had calls all night with White House.” His assistant responded: “That’s good though!” Continenza replied: “Very . . . Still in it . . . Using every angle I know . . . I’ll have no friends left after this in DC lol[.]” *Id.* ¶ 27.

According to a Microsoft Outlook invitation, Continenza met with Kodak’s senior management on June 18, 2020 via Microsoft Teams. The subject line of the meeting reflected that the meeting was to provide a “White House Update.” *Id.* ¶ 28.

That same day, Kodak sent Project Tiger team members, including Kodak executives, an email linking to an internal memorandum. The memorandum warned that it was illegal to trade Kodak stock while in possession of material, non-public information and reminded the recipients to “pre-clear any transaction with [Kodak’s General Counsel] prior to trading.” It stated:

Kodak is a publicly traded company. It is illegal to trade in the securities of a publicly traded company while you are in possession

of material information regarding Kodak that is not generally available to the public. . . . The penalties for such illegal activity are severe and may involve fines and/or incarceration. The information you receive in the course of Kodak's consideration of the Project may from time to time constitute such material non-public information. If you decide to trade in Kodak securities while the project is on-going, you must pre-clear any transaction with [Kodak's General Counsel] prior to trading.

Kodak does not give this admonition on all of its coded projects. Rather, it is generally reserved for projects with large dollar values or that are otherwise significant. *Id.* ¶ 29.

Also on June 18, 2020, in an email to Phlow's CEO, Continenza wrote: "[A]s I told you, Kodak will execute everything we commit to . . . Thank you 100% for everything you are doing. Not just for Kodak, but for the country. Look forward to building an alliance together for all of America." *Id.* ¶ 30.

Over the next few days, Kodak employees continued to supplement the loan application with financial models and other materials, including during the June 20, 2020 Father's Day weekend. *Id.* ¶ 31.

C. Continenza Purchases Kodak Securities.

Throughout this period, Kodak maintained an insider trading policy titled "Limitations on Trading in Kodak Securities" (the "Insider Trading Policy") for employees with "ongoing access to material non-public information." Several provisions of the Insider Trading Policy are relevant here:

1. The Insider Trading Policy limits trading to so-called "Window Periods" – the period between the second business day after the public release of a quarterly filing and one week prior to the quarter's end.
2. The Insider Trading Policy sets a "Clearance Procedure" for transactions in Kodak securities. It directs: "***You are required to pre-clear any transaction in Kodak Securities even during a Window Period.*** A request for pre-clearance should be submitted via email at least one day in advance of the proposed transaction." (emphasis in original). It continues: "Upon receipt of your email, your proposed

transaction will be reviewed and you will receive a response whether or not the transaction is permissible.”

3. The Insider Trading Policy defines “material” as information that “a reasonable investor would consider . . . important in determining whether to buy, sell, or hold Kodak Securities” and specifically lists as “common examples” of “material non-public information” “[s]ignificant new product developments” and “[n]ew major contracts, orders, suppliers, customers or finance sources.”

Id. ¶ 32.

On the morning of Tuesday, June 23, 2020, Continenza and other Kodak employees received a mass email reminding them that June 23, 2020 was the last day that the securities trading window for Kodak stock was open. Kodak’s General Counsel also personally reminded Continenza via text message that it was the last day to trade while providing Continenza with the current price of the stock. *Id.* ¶ 33.

During the afternoon of June 23, 2020, Continenza purchased 46,737 shares of Kodak stock at a weighted average price of \$2.22 per share. *Id.* ¶ 34.

Continenza and Kodak’s General Counsel have stated that Continenza sought and received pre-clearance to purchase Kodak stock from Kodak’s General Counsel during a telephone call either on June 23, 2020 or during the preceding days. However, neither Continenza nor Kodak’s General Counsel has any recollection of the details of any discussion. Continenza did not submit a “request for pre-clearance . . . via email at least one day in advance of the proposed transaction,” per the requirements set forth in the Insider Trading Policy. Nor did Continenza “receive a response whether or not the transaction [was] permissible,” which is also required under the Insider Trading Policy. Further, the purported conversation between Continenza and Kodak’s General Counsel regarding Continenza’s trade was not memorialized in an email or elsewhere. Nor was there any memorialization of any analysis conducted by Kodak’s General Counsel to reach the

conclusion that the non-public information in Continenza's possession was not material. *Id.* ¶ 35.

The Kodak General Counsel's purported oral pre-clearance was inconsistent with: (a) the Insider Trading Policy's requirement that approval be solicited by email one day prior to the proposed transaction and that Continenza "receive a response" to the request as to whether the "transaction [was] permissible;" (b) the Insider Trading Policy's guidance that new product developments, new customers, and new financing sources were all potential material events; and (c) the fact that, in March 2020, Kodak's General Counsel had directed Continenza to refrain from trading in light of "the materiality to the company" of a deal of significantly smaller magnitude and of less salience to investors than the DFC loan. *Id.* ¶ 36.

D. At the Time of Continenza's Stock Purchase, Project Tiger was Confidential, Non-Public, and Material.

On the same day as Continenza's stock purchase, in recognition of Kodak employees' work on the project, and at Continenza's direction, Kodak awarded \$30,000 of motivational bonuses to a number of employees working on the loan application. Later that day, Continenza also spoke with the DFC about Kodak's financial model, which was submitted to the DFC a few days later. *Id.* ¶ 37.

At the time Continenza purchased Kodak stock on June 23, 2020, information about the loan application was not public and would have been considered important by a reasonable investor in light of the total mix of information available. *Id.* ¶ 38.

By that time, Kodak had already submitted an application to the federal government for a \$655 million loan. The loan would have been high-profile, given the ongoing Covid-19 pandemic and the federal government's involvement, and potentially transformative for Kodak's business. *Id.* ¶ 39.

Kodak itself considered the DFC discussions to be serious enough that they warranted the

attention of senior executives and substantial staff, the engagement of EverGlade as a technical advisor at significant expense, an award of special bonuses to key Kodak staff, and a confidential project code name. *Id.* ¶ 40.

E. Kodak Secures a Letter of Interest.

In the weeks following the June 23, 2020 stock purchase, Kodak continued to work on the submission, including by preparing a financial model and business plan and communicating with the DFC. *Id.* ¶ 41.

On June 25, 2020, Kodak had a call with a DFC representative during which they discussed the financial model and business plan. Later that day, Continenza emailed the DFC representative stating: “As I told you, Kodak will execute everything we commit to.” *Id.* ¶ 42.

On June 26, 2020, Kodak submitted a completed loan application and business plan to the DFC for \$765 million, comprising the original \$655 million, plus \$110 million in additional funds earmarked for interest, principal payments, and operating capital. *Id.* ¶ 43.

By June 26, 2020, Kodak projected that the pharmaceuticals project would generate annual revenues of more than \$200 million by 2024 and more than \$300 million by 2025, with further increases in revenue to follow. Kodak also projected internally that the pharmaceuticals project would soon be profitable, with positive cash flow and annual Earnings Before Income Tax Depreciation and Amortization of more than \$150 million by 2025. *Id.* ¶ 44.

These figures were significant in relation to Kodak’s existing business as of June 2020. Kodak’s net operating earnings for all of its businesses in 2019 totaled \$116 million, on approximately \$1.2 billion in revenue, and Kodak was experiencing a significant cash crunch. Thus, the loan represented more than six times Kodak’s net operating earnings and more than 63% of its revenue for 2019. *Id.* ¶ 45.

The DFC evaluated Kodak's submission over the following few weeks. Then, on July 22, 2020, a DFC official visited Kodak's facilities in Rochester, New York. Continenza, who ordinarily worked from his home office in Minnesota during the pandemic, traveled to Kodak's headquarters in Rochester, New York to participate in the DFC official's visit in person. At the conclusion of that visit, the DFC official informed Kodak that the DFC would enter into a letter of interest with Kodak concerning the loan. Kodak understood that a loan would follow within "a few weeks" after additional diligence. *Id.* ¶ 46.

F. The Letter of Interest is Disclosed to the Market, and Kodak's Share Price Skyrockets.

Following the DFC official's visit, Kodak and the DFC planned for an official in-person event to announce the Letter of Interest. *Id.* ¶ 47.

On the morning of July 28, 2020, the DFC published a press release announcing that Kodak and the DFC intended to execute the Letter of Interest to provide Kodak a \$765 million loan, which was also announced that evening during an in-person signing ceremony and press conference in Rochester, New York, attended by Continenza, other Kodak executives, and federal government officials, including Navarro. Kodak's CTO described the announcement as a "Kodak moment" that he would "remember for a long time." *Id.* ¶ 48.

The pharmaceuticals project set out in the Letter of Interest was essentially identical in scope to the project contemplated in the loan application that Kodak had submitted to the DFC on June 16, 2020, seven days before Continenza bought Kodak stock. *Id.* ¶ 49.

Continenza also publicized Kodak's loan during media interviews. In a July 28, 2020 interview with *The Wall Street Journal*, Continenza predicted that Kodak's pharmaceutical business would be able to "get up and running quickly," that it would make up 30% to 40% of Kodak's business over time, and that the loan would create 300 jobs in Rochester and 30 to 50

jobs in Minnesota. *Id.* ¶ 50.

Then, in a July 29, 2020 interview with CNBC's Squawk Box prior to the market open, Continenza stated that he was "very comfortable" that Kodak could "bank on" the loan from the DFC, that "[w]e have some work to do," and that Kodak was "very comfortable we're gonna get to the end game. We signed a letter of interest, but we've been working on this for a few months. We feel very comfortable we're gonna get to the end game or we wouldn't be probably sitting here." Continenza added that "through continuous manufacturing and innovation, we feel that we can become very competitive," and that Kodak planned to repurpose "a third or forty percent" of its facilities for the project. *Id.* ¶ 51.

The market reacted favorably to the Letter of Interest news. On July 28, 2020, Kodak's stock price surged more than \$7.00 per share from its prior close at \$2.62 per share, opening at \$9.63 per share. It reached a high of \$11.80 per share on July 28, and nearly 285 million Kodak shares traded that day, as compared to 75,000 shares two trading days earlier, before closing at \$7.94 per share. *Id.* ¶ 52.

On July 29, 2020, the day after the Letter of Interest announcement, Kodak's stock reached a high of \$60.00 per share, and more than 276 million Kodak shares traded in the market, before closing at \$33.20 per share. *Id.* ¶ 53.

On August 7, 2020, following public scrutiny of the loan and trading surrounding it, the DFC announced that it was putting its loan to Kodak on hold. *Id.* ¶ 54.

G. Kodak Falsely Claims that Continenza's Trading Complied With Its Insider Trading Policy.

On May 17, 2021, Kodak made two separate SEC filings containing false and misleading statements: (1) Form 10-Q, quarterly report pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the quarterly period ended March 31, 2021 (the "May 17, 2021 Form

10-Q”); and (2) Schedule 14A, Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934 (the “May 17, 2021 Amended Proxy Statement”). *Id.* ¶ 55.

In the May 17, 2021 Form 10-Q, Kodak wrote to shareholders:

The Attorney General of the State of New York has threatened to file a lawsuit against the Company and its Chief Executive Officer alleging violations of New York State’s Martin Act in connection with the Chief Executive Officer’s purchase of 46,737 shares of the Company’s common stock on June 23, 2020 (the “Threatened Claim”). This purchase was made by the Chief Executive Officer during an ‘open window’ period and in compliance with the Company’s insider trading policy, including pre-approval by its general counsel. The Chief Executive Officer has never sold any Kodak shares. The Company considers the Threatened Claim to Be unsupported by law or fact and intends to vigorously defend itself against the Threatened Claim should it be filed.

Id. ¶ 56.

Kodak’s Chief Accounting Officer and Corporate Controller (Chief Accounting Officer and Authorized Signatory) signed the May 17, 2021 Form 10-Q on behalf of Kodak, pursuant to the requirements of the Securities Exchange Act of 1934. Further, Respondent Continenza and CFO David Bullwinkle signed the Certifications filed with the May 17, 2021 Form 10-Q. Continenza and Bullwinkle each certified the following (among other things): (1) that he had “reviewed the Form 10-Q;” and (2) that “[b]ased on [his] knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report.” *Id.* ¶ 57.

Similarly, in the May 17, 2021 Amended Proxy Statement, Kodak wrote to shareholders:

As reported by Eastman Kodak Company (the “Company”) in its Quarterly Report on Form 10-Q for the quarter ended March 31, 2021 as filed with the U.S. Securities and Exchange Commission (the “SEC”) on May 17, 2021, the Attorney General of the State of New York has threatened to file a complaint against the Company

and its Chief Executive Officer, James V. Continenza, alleging violations of New York State's Martin Act in connection with Mr. Continenza's purchase of 46,737 shares of the Company's common stock on June 23, 2020 (the "Threatened Claim"). This purchase was made by Mr. Continenza during an 'open window' period and in compliance with the Company's insider trading policy, including pre-approval by its general counsel. Mr. Continenza has never sold these or any other Kodak shares. The Threatened Claim may or may not be filed prior to the Annual Meeting of Shareholders of the Company (the "Annual Meeting").

Id. ¶ 58.

These statements were false and misleading. As discussed above, Continenza did not receive pre-clearance in accordance with Kodak's Insider Trading Policy, which mandates that pre-clearance be sought by email one day prior to the proposed transaction and that the requester "receive a response" from Kodak's General Counsel approving the proposed transaction prior to trading. *Id.* ¶ 59.

Kodak made these two statements about Continenza's trading less than 48 hours before Kodak's 2021 Annual Meeting of Shareholders (the "Annual Meeting"), during which Kodak's shareholders were set to vote on, among other things, whether to re-elect Continenza as Executive Chairman and whether to approve, through an advisory vote, his 2021 compensation. Continenza's 2021 compensation consists of: a base salary of \$1,000,000; a cash bonus of \$1,000,000; 200,000 fully vested restricted stock units ("RSUs"); and 300,000 unvested RSUs. (As a note of comparison, Continenza's 2020 compensation exceeded \$11.9 million). During the Annual Meeting, which was held virtually on May 19, 2021 at 1:00 p.m. ET, Kodak's shareholders re-elected Continenza as Executive Chairman to serve another term of one year, and they approved, through an advisory vote, Continenza's 2021 compensation. *Id.* ¶ 60.

H. OAG Determines to Commence a Proceeding and Seeks Relief Under GBL § 354.

The Attorney General has determined to bring a Martin Act securities fraud action against Continenza and Kodak. Before commencing that action, the Attorney General seeks an order under GBL § 354 directing Continenza and Kodak General Counsel Roger Byrd to give public testimony under oath before a Justice of the New York Supreme Court or a Referee designated by the Court, and to produce papers and documents concerning the fraudulent practices to which the planned action relates (as described in further detail in the accompanying Proposed Order). *Id.* ¶¶ 5, 6, 61.

Specifically, the Attorney General seeks the following Documents and Communications, in the possession, custody, or control of Kodak, Continenza, and Kodak's Chief Financial Officer David Bullwinkle, General Counsel Roger Byrd, Managing Director of Corporate Development Paula Gutkin, Chief Accounting Officer Richard Michaels, and Chief Technical Officer Terry Taber:

1. All Documents and Communications responsive to the Subpoena *Duces Tecum* from the State of New York Office of the Attorney General to Eastman Kodak Company, dated November 25, 2020 (hereinafter, the "November 25, 2020 Subpoena") that have not been produced previously to the OAG;¹
2. All Documents and Communications Concerning Kodak's statements regarding the Attorney General's investigation in the May 17, 2021 Form 10-Q, the May 17, 2021 Amended Proxy Statement, and during the May 19, 2021 Annual Meeting, including, but not limited to, Communications with public relations consultants or advisors, the media, and investors or potential investors, amongst Kodak employees and/or agents, and/or to any other Person or Entity, other than solely with counsel representing Kodak in this matter; and
3. All Communications with non-Kodak employees from June 1, 2020 through August 31, 2020 Concerning Kodak securities, Project Tiger, and/or any Kodak actual or potential Covid-19-related project, and All Documents Concerning such

¹ All capitalized terms not otherwise defined herein shall have the meanings contained in the November 25, 2020 Subpoena.

Communications.

III. LEGAL STANDARDS

The Martin Act “gives the Attorney General broad regulatory and remedial powers to investigat[e] and interven[e] at the first indication of possible...fraud on the public and, thereafter, if appropriate, to commence civil or criminal prosecution.” *People v. iFinex*, 185 A.D.3d 22, 26 (1st Dep’t 2020) (quoting *Assured Guar. [UK] Ltd. v. J.P. Morgan Inv. Mgt. Inc.*, 18 NY3d 341, 350 (2011) (internal quotations omitted)).

The New York State Legislature gave the Attorney General a variety of tools to conduct these investigations. The General Business Law permits the Attorney General to investigate Martin Act violations “either through confidential investigations conducted under compulsion of subpoena” under GBL § 352 “or through public [Court supervised] investigations conducted pursuant to court order” under GBL § 354. *People v. 7040 Colonial Rd. Assocs. Co.*, 176 Misc. 2d 367, 370 (N.Y. Sup. Ct. 1998).

For public investigations, GBL § 354 authorizes the Attorney General to seek an order requiring public testimony under oath before a Justice of the New York Supreme Court or a Referee designated by the Court and production of documents. It “permits the Attorney General to seek an ex parte order in Supreme Court requiring the subjects of an investigation to produce documents and testify under oath.” *People v. iFinex*, 185 A.D.3d 22, 26 (1st Dep’t 2020).

To obtain a court order under GBL § 354 requiring public testimony and compelling production of documents, the Attorney General must have “determined to commence an action under this article,” GBL § 354, and the Attorney General has made that determination here. Having made that determination, the Attorney General “may simply show upon [her] information and belief that the testimony . . . is material and necessary.” GBL § 354.

Once the Attorney General has made that showing upon information and belief, then “[t]he order shall be granted by the justice of the supreme court to whom the application has been made.” *Id.* Nearly a century ago, in an opinion by Justice Cardozo, the Court of Appeals recognized that the Attorney General may examine witnesses under this provision “almost upon mere request.” *Ottinger v. State Civil Serv. Comm’n*, 240 N.Y. 435, 439 (1925) (Cardozo, J.); *Matter of Attorney-General (Amer. Rsch. Council)*, 10 N.Y.2d 108, 111 (1961), *cert. denied*, 368 U.S. 947 (1961).

IV. ARGUMENT

The standards for obtaining an order directing Kodak witnesses to testify during public examinations and directing Kodak and its employees to produce documents have been met and exceeded here. The Attorney General has: (1) “determined to commence an action under this article;” and (2) has shown “simply . . . upon [her] information and belief that the testimony of such person or persons is material and necessary.” GBL § 354.

A. **The Attorney General Has Determined to Bring a Martin Act Action Against Continenza and Kodak.**

The Martin Act prohibits “fraudulent practices” and other “violation[s] of law” in connection with securities transactions. GBL § 352-1. The Act applies to any party “concerned in or in any way participating in . . . such fraudulent practices.” *People v. Justin*, 779 N.Y.S.2d 717, 735 (N.Y. Sup. Ct. 2003) (citing GBL § 353[a]).

“The purpose of the law is to prevent all kinds of fraud in connection with the sale of securities . . . whereby the public is fraudulently exploited.” *People v. Federated Radio Corp.*, 244 N.Y. 33, 38 (1926). Consistent with the remedial purpose of the Martin Act, courts give the term “fraudulent practices” “a wide meaning so as to embrace all deceitful practices contrary to the plain rules of common honesty[.]” *People v. Lexington Sixty-First Assocs.*, 38 N.Y.2d 588, 595 (1976).

The Martin Act reaches “all acts, even though not originating in any actual evil design to perpetrate fraud or injury upon others, which do tend to deceive or mislead” and no showing of scienter is required. *Id.*; see also *People v. Credit Suisse Sec.*, 31 N.Y.3d 622, 632 (2018) (“[T]he Attorney General need not prove scienter or intentional fraud in a Martin Act enforcement proceeding.” (citing *People v. Rachmani Corp.*, 71 N.Y.2d 718, 725 n.6 (1988)). As one court explained, “Good faith is not the issue.” *People v. Cadplaz Sponsors, Inc.*, 330 N.Y.S. 2d 430, 432 (N.Y. Sup. Ct. 1972).

Fraudulent practices include insider trading by corporate executives. New York courts have long held that “a person who acquires special knowledge or information by virtue of a confidential or fiduciary relationship with another is not free to exploit that knowledge or information for his own personal benefit[.]” *Diamond v. Oreamuno*, 24 N.Y.2d 494, 497 (1969).

Nearly four decades ago, insider trading was specifically recognized as a fraudulent practice under the Martin Act, see *People v. Florentino*, 456 N.Y.S.2d 638, 641, 644 n.7 (N.Y. Crim. Ct. 1982) (citing *Diamond*), which the Court of Appeals has repeatedly held “expands upon . . . the common law of fraud.” *People v. Credit Suisse Sec.*, 31 N.Y.3d 622, 632 (2018).

Two decades ago, the First Department again recognized insider trading as a fraudulent practice under the Martin Act. *People v. Napolitano*, 282 A.D.2d 49, 53-56 (1st Dep’t 2001). The Court explained that an insider in possession of non-public information of significance must abstain from trading or disclose the information. *Id.* at 54. The Court held that, by failing to do so and “trading, [the insider] falsely communicated that he was permitted to trade even though he had a duty to disclose the confidential information or to abstain from trading.” *Id.* at 56. Indeed, the First Department held that this false communication was sufficient even to satisfy the elements of larceny by false pretenses. *Id.*

Here, the Attorney General has determined to bring an action against both Kodak and Continenza. With respect to Continenza, the Attorney General has determined to bring an action under the Martin Act for insider trading. Continenza purchased shares while aware of non-public information concerning the loan application that would have been important to investors.

With respect to Kodak, the Attorney General has determined to bring an action under the Martin Act on two bases:

1. Continenza's Purchase of Kodak securities on June 23, 2020: Kodak assisted and facilitated Continenza's trading and therefore was "concerned in" and "participat[ed] in" Continenza's fraudulent conduct. *See Justin*, 779 N.Y.S.2d at 735. It is also liable for Continenza's trading because "high ranking officers in a corporation, or partners in a partnership, present a different situation from lower level employees. Officers are able to make policy and generally carry authority to bind the corporation." *SEC v. Tome*, 638 F. Supp. 596, 625 (S.D.N.Y. 1986) (recognizing liability of corporation of senior executives in context of insider trading).
2. Kodak's May 17, 2021 False and Misleading Statements: Kodak falsely stated in in the May 17, 2021 Form10-Q and the May 17, 2021 Amended Proxy Statement that Continenza's trading complied with its Insider Trading Policy. The Martin Act plainly prohibits material false statements to investors. *Credit Suisse Sec.*, 31 N.Y.3d at 632. Here, Kodak's statements were false and misleading and bore on matters of importance to shareholders relating to Kodak's corporate integrity and its litigation risk. Kodak itself recognized the importance of the statements, as evidenced by its decision to knowingly include them in SEC filings and by Continenza's and Bullwinkle's Certifications that the statements were not untrue or misleading.

B. The Documents and Testimony Sought are Material and Necessary.

As to the second prong of GBL § 354, the Attorney General has shown "upon [her] information and belief that the testimony of such person or persons is material and necessary." The need for and materiality of the documents and testimony of those involved in the fraudulent conduct are self-apparent and far exceed Justice Cardozo's standard that testimony and documents must be provided "almost upon mere request." *Ottinger v. State Civil Serv. Comm'n*, 240 N.Y. 435, 439 (1925) (Cardozo, J.).

V. OAG'S REQUESTED RELIEF

Based on its investigation to date, the OAG has determined to commence an action for violations of the Martin Act. As explicitly authorized by GBL § 354, the Attorney General now seeks additional evidence before beginning that action.

The Proposed Order accompanying this Affirmation details the relief sought by the OAG.

No previous application for the relief requested in the Proposed Order has been made by the Attorney General to this or any other court.

VI. CONCLUSION

For all the reasons stated herein, the Court should grant the OAG's application.

Dated: June 1, 2021
New York, New York

Respectfully submitted,

LETITIA JAMES
Attorney General of the State of New York

By: /s/ Mary Kay Dunning

Mary Kay Dunning
Senior Enforcement Counsel

Jeffrey A. Novack
Assistant Attorney General

Of Counsel:
Peter Pope
Bureau Chief, Investor Protection Bureau

Office of the New York State Attorney
General
Investor Protection Bureau
28 Liberty Street
New York, New York 10005
Tel. (212) 416-6178

Petitioner