

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

ANTHONY ROSIAN, et al.,

Plaintiff,

vs.

MAGNUM HUNTER RESOURCES, INC., et al.,

Defendants.

Electronically Filed

Civil Action 1:13-cv-02668-KBF

Judge Katherine Forrest

**MEMORANDUM OF LAW IN SUPPORT OF TUAN THANH LY'S MOTION  
FOR APPOINTMENT AS LEAD PLAINTIFF AND APPROVAL OF COUNSEL**

**PRELIMINARY STATEMENT**

Presently pending before the Court is one consolidated securities class action lawsuit (the “Action”) brought on behalf of all persons or entities (the “Class”) who purchased Magnum Hunter Corporation (“Magnum” or the “Company”) securities between January 17, 2012 and April 22, 2013 (the “Class Period”) against Defendants Magnum and several Magnum officers.

Movant Tuan Thanh Ly (“Movant”) lost \$59,607 as a result of his Magnum investments. Movant respectfully submits this memorandum of law in support of his motion for: (a) appointment as lead plaintiff, pursuant to the Private Securities Litigation Reform Act of 1995 (the “PSLRA”); and (b) approval of his selection of Bernstein Liebhard LLP (“Bernstein Liebhard”) as lead counsel.

Movant believes that he has the largest financial interest in the outcome of the case. As such, Movant meets the requirements of the PSLRA for appointment as lead plaintiff. Moreover, Movant satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure in that his claims are typical of the claims of the Class, and he will fairly and adequately represent the interests of the Class.

**STATEMENT OF FACTS**

Magnum is an independent oil and gas company that engages in the acquisition, exploration, exploitation, development and production of crude oil, natural gas and natural gas liquids primarily in West Virginia, Ohio, Texas, Kentucky, North Dakota and Saskatchewan, Canada. On April 16, 2013, Magnum disclosed that at the direction of the Audit Committee of the Company’s Board of Directors, Magnum had dismissed its auditor, PricewaterhouseCoopers LLP (“PwC”), after PwC advised the Company of material weaknesses in the Company’s internal accounting controls. PwC identified certain issues that may have a material impact on the fairness or reliability of Magnum’s consolidated financial statements, including: (1) valuation

of the Company's oil and gas properties; (2) calculation of the Company's oil and gas reserves; (3) the Company's position with respect to certain tax matters; (4) the Company's accounting of its acquisition of NGAS Resources, Inc.; and (5) the Company's compliance with certain debt covenants.

As a result of this news, Magnum shares declined nearly 15%, or \$0.49 per share, to close at \$2.83 per share on April 17, 2013 on unusually heavy trading volume.

## **ARGUMENT**

### **I. THE COURT SHOULD APPOINT MOVANT AS LEAD PLAINTIFF**

#### **A. The Procedure Required By The PSLRA**

The PSLRA establishes the procedure for appointment of the lead plaintiff in "each private action arising under [the Exchange Act] that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure." Sections 21D(a)(1) and (a)(3)(B), 15 U.S.C. §§ 78u-4(a)(1) and (a)(3)(B).

First, the plaintiff who files the initial action must publish notice to the class within 20 days after filing the action, informing class members of their right to file a motion for appointment of lead plaintiff. Section 21D(a)(3)(B)(ii), 15 U.S.C. § 78u-4(a)(3)(B)(ii). The PSLRA requires the court to consider within 90 days all motions that were filed within 60 days after publication of that notice made by any person or group of persons who are members of the proposed class to be appointed lead plaintiff. Sections 21D(a)(3)(A)(i)(II) and (a)(3)(B)(i), 15 U.S.C. §§ 78u-4(a)(3)(A)(i)(II) and (a)(3)(B)(i).

The PSLRA provides a presumption that the most "adequate plaintiff" to serve as lead plaintiff is the person that:

- i) has either filed the complaint or made a motion in response to a notice under subparagraph (A)(i);

- ii) in the determination of the court, has the largest financial interest in the relief sought by the class; and
- iii) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

Section 21D(a)(3)(B)(iii)(I), 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). The presumption may be rebutted only upon proof by a class member 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.” Section 21D(a)(3)(B)(iii)(II), 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II).

As set forth below, Movant satisfies the foregoing criteria and he is not aware of any unique defenses that Defendants could raise against him. Therefore, Movant is entitled to the presumption that he is the most adequate plaintiff to represent the Class and, as a result, should be appointed lead plaintiff in the Action.

**1. Movant Is Willing To Serve As Class Representative**

On April 23, 2013, counsel caused a notice (the “Notice”) to be published pursuant to Section 21D(a)(3)(A)(i), which announced that a securities class action had been filed against, among others, Magnum, and which advised putative class members that they had sixty days from the date of the notice to file a motion to seek appointment as a lead plaintiff in the action. *See* Seidman Decl. Ex. 1. Movant has reviewed one of the complaints filed in the Action and has timely filed his motion pursuant to the Notice. In doing so, Movant has attached his certification attesting to his willingness to serve as representative of the Class and provide testimony at deposition and trial, if necessary. *See* Seidman Decl. Ex. 2. Accordingly, Movant satisfies the first requirement to serve as lead plaintiff for the Class. Section 21D(a)(3)(B)(iii)(I)(aa), 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(aa).

**2. Movant Is The Most Adequate Lead Plaintiff**

Under the PSLRA, any member of the purported class may move for appointment as lead plaintiff within 60 days of the publication of notice that the action has been filed. *See* 15 U.S.C. § 78u-4(a)(3)(A)(i)(II). Subsequently, the court “shall appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of class members . . . .”). 15 U.S.C. § 78u-4(a)(3)(B)(i).

Movant believes his \$59,607 loss constitutes the largest financial interest in the outcome of the Actions. As such, Movant is the most adequate lead plaintiff and should be appointed as lead plaintiff. *See* Ex. C to Seidman Declaration.

**3. Movant Meets The Requirements Of Fed. R. Civ. P. 23**

Equally important, Movant satisfies the adequacy and typicality requirements of Rule 23 of the Federal Rules of Civil Procedure, which are the provisions of Rule 23 relevant to the appointment of lead plaintiff under the PSLRA. *See Weltz v. Lee*, 199 F.R.D. 129, 133 (S.D.N.Y. 2001) (considering only typicality and adequacy on a motion for designation of lead plaintiff and lead counsel).

Movant’s certification establishes that he meets the typicality requirement of Rule 23 because he (i) suffered the same injuries as the absent class members; (ii) suffered as a result of the same course of conduct by Defendants; and (iii) his claims are based on the same legal issues. *See Robidoux v. Celani*, 987 F.2d 931, 936-37 (2d Cir. 1993). Rule 23 does not require that the named plaintiffs be identically situated with all class members. It is enough if their situations share a common issue of law or fact. *See In re NASDAQ Mkt.-Makers Antitrust Litig.*, 172 F.R.D. 119, 127 (S.D.N.Y. 1997). A finding of commonality frequently supports a finding of typicality. Here, the questions of law and fact common to the members of the Class and which may affect individual Class members include the following:

- whether the federal securities laws were violated by Defendants' acts;
- whether statements made by Defendants to the investing public contained material misrepresentations concerning the business and operations of Magnum; and
- whether the members of the Class sustained damages and, if so, what is the proper measure of damages.

These questions apply equally to Movant as to all members of the purported Class. Similar to other members of the Class, Movant purchased shares of Magnum common stock at prices materially distorted as a result of Defendants' misrepresentations. Because Movant's claims are based on the same legal theories and "arise from the same course of conduct that gives rise to the claims of other Class members," the typicality requirement is satisfied. *See NASDAQ Mkt.-Makers*, 172 F.R.D. at 126.

## **II. THE COURT SHOULD APPROVE MOVANT'S CHOICE OF COUNSEL**

The PSLRA vests authority in the lead plaintiff to select and retain lead counsel, subject to court approval. Section 21D(a)(3)(B)(v), 15 U.S.C. § 78u-4(a)(3)(B)(v). The Court should interfere with the lead plaintiff's selection of counsel only when necessary "to protect the interests of the class." Section 21D(a)(3)(B)(iii)(II)(aa), 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II)(aa).

Bernstein Liebhard has extensive experience prosecuting complex securities class actions, such as this one, and is well qualified to represent the Class. *See Seidman Decl. Ex. 4* for the firm resume of Bernstein Liebhard. As a result, the Court may be assured that by approving Bernstein Liebhard as lead counsel, the Class is receiving the best legal representation available.

Bernstein Liebhard has frequently been appointed as lead counsel since the passage of the PSLRA, and has frequently appeared in major actions before this and other courts throughout the country. Indeed, *The National Law Journal* has recognized Bernstein Liebhard for nine consecutive years as one of the top plaintiffs' firms in the country. Bernstein Liebhard has also

been listed in *The Legal 500*, a guide to the best commercial law firms in the United States, for the past four years.

Four of Bernstein Liebhard's recent outstanding successes include:

- *In re Marsh & McLennan Cos. Sec. Litig.*, No. 04-CV-8144 (CM) (S.D.N.Y. 2009) (settlement: \$400 million);
- *In re Royal Dutch/Shell Transport Securities Litigation*, No. 04-374 (JAP) (D.N.J. 2008) (Judge Joel A. Pisano gave final approval to a U.S. settlement with a minimum cash value of \$130 million. This settlement is in addition to a \$350 million European settlement on behalf of a class of non-U.S. purchasers of Shell securities on non-U.S. exchanges, which the court-appointed lead plaintiffs and Bernstein Liebhard were, in the words of Judge Pisano, a "substantial factor" in bringing about);
- *In re Deutsche Telekom AG Securities Litigation*, No. 00-CV-9475 (SHS) (S.D.N.Y. 2005) (settlement: \$120 million, representing 188% of the recognized losses); and
- *In re Cigna Corp. Securities Litigation*, No. 2:02CV8088 (E.D. Pa. 2007) (settlement: \$93 million).

Further, Bernstein Liebhard partner Stanley Bernstein served as Chairman of the Executive Committee in *In re Initial Public Offering Securities Litigation* ("IPO"), No. 21 MC 92 (SS) (S.D.N.Y. 2009) before Judge Shira Scheindlin in this District. The IPO litigation is one of the biggest securities class actions ever prosecuted. On October 5, 2009, the Court granted final approval to a \$586 million settlement.

### **CONCLUSION**

For the foregoing reasons, Movant respectfully requests that this Court: (1) appoint Movant as lead plaintiff in the captioned, and all subsequently-filed, related actions; and (2)

approve Movant's selection of Bernstein Liebhard as lead counsel.

Dated: June 24, 2013

Respectfully submitted,

**BERNSTEIN LIEBHARD LLP**

/s/ Joseph R. Seidman, Jr.

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