

MARY PAPPAS, Individually and on
Behalf of Others Similarly Situated,

)
)
) Case No. 13-cv-3446-KBF
)
)

Plaintiff

vs.

MAGNUM HUNTER RESOURCES
CORPORATION, GARY C. EVANS,
RONALD D. ORMAND, and FRED J.
SMITH, JR.

Defendants.

DAVID MACATTE, Individually and
on Behalf of All Other Persons
Similarly Situated,

)
)
) Case No. 13-cv-3899-KBF
)
)

Plaintiff,

v.

MAGNUM HUNTER RESOURCES
CORP. GARY C. EVANS, RON
ORMAND, JAMES W. DENNY, III
and H.C. "KIP" FERGUSON, III,

Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF MOTION OF MARY PAPPAS
AND THE ILNAF TRUST FOR CONSOLIDATION, APPOINTMENT AS LEAD
PLAINTIFF, AND APPROVAL OF SELECTION OF COUNSEL**

Mary Pappas and the ILNAF Trust (“Movant”), submit this Memorandum of Law in support of their Motion, pursuant to Section 21D(a)(3) of the Securities Exchange Act of 1934 (the “Exchange Act”), 15 U.S.C. § 78u-4(a)(3), as amended by the Private Securities Litigation Reform Act of 1995 (the “PSLRA”), for an order: (1) consolidating the above-captioned related actions (the “Actions”); (2) appointing Mary Pappas and the ILNAF Trust as Lead Plaintiff on behalf of a class of purchasers of Magnum Hunter Resources Corporation (“Magnum Hunter”) common stock between January 17, 2012 through April 22, 2013, inclusive; and (3) approving the selection of Finkelstein & Krinsk LLP (“Finkelstein & Krinsk”) as Lead Counsel for the Class and Zamansky & Associates LLC (“Zamansky & Associates”) as Liaison Counsel for the Class.

PRELIMINARY STATEMENT

Pending before the Court are five class actions brought against Magnum Hunter for violations of Sections 10(b) and 20(a) of the Exchange Act and SEC Rules 10b-5 promulgated thereunder. The Actions are:

- *Rosian v. Magnum Hunter Resources Corp. et al*, No. 1:13-cv-02668 (S.D.N.Y. Apr 25, 2013);
- *Foster v. Magnum Hunter Resources Corp. et al*, No. 1:13-cv-02766 (S.D.N.Y. Apr 25, 2013);
- *Atchley v. Magnum Hunter Resources Corp. et al*, No. 1:13-cv-02969 (S.D.N.Y. May 02, 2013);
- *Pappas v. Magnum Hunter Resources Corp. et al*, No. 1:13-cv-03446 (S.D.N.Y. May 22, 2013); and
- *Macatte v. Magnum Hunter Resources Corp. et al*, No. 1:13-cv-03899 (S.D.N.Y. June 7, 2013).

FACTUAL BACKGROUND

This securities class action is brought on behalf of purchasers of Magnum Hunter securities between January 17, 2012 through April 22, 2013, inclusive (the “Class” and “Class Period”).¹

Magnum Hunter 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. On April 16, 2013, the Company disclosed that it had dismissed its auditor, PricewaterhouseCoopers LLP (“PwC”) at the direction of the Audit Committee of the Company’s Board of Directors, after PwC advised the Company of material weaknesses in the Company’s internal accounting controls. According to the Company, 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 Hunter 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.

¹ For purposes of this motion, the largest class period set forth in the *Foster* action, January 17, 2012 through April 22, 2013, is utilized. In determining the lead plaintiff, it is proper to use “the longer, most inclusive class period...as it encompasses more potential class members.” *In re Doral Fin. Corp. Sec. Litig.*, 414 F. Supp.2d 398, 402 (S.D.N.Y. 2006); *HCL Partners Limited P’ship. v. Leap Wireless Int’l, Inc.*, 2008 U.S. Dist. LEXIS 43615, at *4 n.2 (S.D. Cal. May 22, 2008) (using the longest class period to determine the lead plaintiff.).

On April 22, 2013, Magnum Hunter disclosed that PwC, in a letter dated April 18, 2013 letter to the Company, disagreed with the Company's account of events. On this news, the Company's stock fell further on usually high trading volume, closing at \$2.50 per share.

ARGUMENT

I. THE RELATED ACTIONS SHOULD BE CONSOLIDATED

The PSLRA requires the Court to consider a motion to consolidate prior to deciding a motion for appointment of lead plaintiff. See 15 U.S.C. § 78u-4(a)(3)(B)(ii). Consolidation pursuant to Rule 42(a) of the Federal Rules of Civil Procedure (“Rule 42(a)”) is proper when actions involve common questions of law and fact. *See Stone v. Agnico-Eagle Mines Ltd.*, 280 F.R.D. 142, 143 (S.D.N.Y. 2012). The Court has broad discretion to consolidate cases pending within the District. *Id.* The instant actions present substantially similar factual and legal issues, arise from the same alleged scheme by Defendants, and allege violations of federal securities laws. On May 16, 2013, the *Foster* and *Atchley* actions were consolidated with the low numbered *Rosain* action. *Rosain*, 13-cv-02668, Dkt. # 11. The *Pappas* and *Macattee* actions should likewise be consolidated.

II. MOVANT SHOULD BE APPOINTED LEAD PLAINTIFF

A. The PSLRA Standard for Appointing Lead Plaintiff

The PSLRA provides a straightforward, sequential procedure for selecting lead plaintiff for “each private action arising under [the Exchange Act] that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure.” See 15 U.S.C. § 78u-4(a)(1); *see also* 15 U.S.C. § 78u-4(a)(3)(B). First, Section 21D(a)(3)(A)(i) of the Exchange Act, as amended by the PSLRA, specifies that:

Not later than 20 days after the date on which the complaint is filed, the plaintiff or plaintiffs shall cause to be published, in a widely circulated national business-oriented publication or wireservice, a notice advising members of the purported plaintiff class –

(I) of the pendency of the action, the claims asserted therein, and the purported class period; and

(II) that, not later than 60 days after the date on which the notice is published, any member of the purported class may move the court to serve as lead plaintiff of the purported class.

15 U.S.C. § 78u-4(a)(3)(A)(i). Next, under the PSLRA, a court is to consider all motions made by class members and appoint the movant that the court determines to be most capable of adequately representing the interests of the class as lead plaintiff. Specifically, the PSLRA provides that a 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 (...the “most adequate plaintiff”)...

15 U.S.C. § 78u-4(a)(3)(B)(i).

In adjudicating a lead plaintiff motion, a court shall adopt a presumption that the “most adequate plaintiff” is the person or group of persons who: (1) filed a complaint or made a motion to serve as lead plaintiff; (2) has the largest financial interest in the relief sought by the class; and (3) who otherwise satisfies the requirements of Rule 23. See 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). This presumption may be rebutted by a showing 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.” 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II).

B. Movant is the “Most Adequate Plaintiff”

Mary Pappas and The ILNAF Trust respectfully submit that they are the “most adequate plaintiff” because she has complied with the PSLRA’s procedural requirements, holds the largest financial interest of any movant, and satisfies Rule 23’s typicality and adequacy requirements.²

1. The PSLRA’s Procedural Prerequisites Have Been Satisfied

Mary Pappas filed her complaint on May 22, 2013 and Movant filed this motion to serve as lead plaintiff in a timely manner. Pursuant to 15 U.S.C. § 78u-4(a)(3)(A)(i), the first plaintiff to file a complaint in this action caused notice regarding the pending nature of this case to be published on BusinessWire, a widely-circulated, national, business-oriented news wire service, on April 23, 2013. *See* Declaration of Jacob H. Zamansky (“Zamansky Decl.”), Ex. A. Thus, pursuant to the PSLRA, any person who is a member of the proposed Class may apply to be appointed lead plaintiff within sixty days after publication of the notice, *i.e.*, on or before June 24, 2013. Movant timely filed this motion.

2. Movant has the Largest Financial Interest in the Outcome of the Action

The PSLRA provides a rebuttable presumption that the “most adequate plaintiff” for lead plaintiff purposes is the movant with the largest financial interest in the relief sought by the class, so long as the movant meets the requirements of Rule 23. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I).

² Mary Pappas and Constantine Bizunis, Trustee and Beneficiary of the ILNAF Trust have a long standing pre-existing personal and professional relationship.

Although the PSLRA does not prescribe a particular method for calculating the largest financial interest, courts utilize the following four factors to determine financial interest in other PSLRA actions: (1) the number of shares purchased, (2) the number of net shares purchased, (3) the amount of net funds expended, and (4) the approximate monetary loss. *See Varghese v. China Shenghuo Pharm. Holdings, Inc.*, 589 F. Supp. 2d 388, 395 (S.D.N.Y. 2008). Courts have placed the most emphasis on the last of the four factors: the approximate loss suffered by the movant. *Foley v. Transocean Ltd.*, 272 F.R.D. 126, 127-128 (S.D.N.Y. 2011).

During the Class Period, Movant purchased **103,500** Magnum Hunter shares and suffered at least **\$34,600.00** in losses. Zamansky Decl., Ex. B (certifications) and Ex. C (loss charts).³ Movant is presently unaware of any other movant with a greater financial interest in the outcome of the Action and also satisfies Rule 23's typicality and adequacy requirements and is entitled to the legal presumption that Movant is the most adequate plaintiff.

3. Movant Satisfies Rule 23's Typicality and Adequacy Requirements

In addition to the largest financial interest requirement, the PSLRA also directs that the lead plaintiff must "otherwise satisf[y] the requirements of Rule 23..." 15 U.S.C. § 78u-(4)(a)(3)(B)(iii)(I)(cc). With respect to class certification, Rule 23(a) requires that: (1) the class be so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) such claims are typical of those of the class; and (4) the representative will fairly and adequately protect the interests of the

³ The ILNAF Trust also engaged in Magnum Hunter options trading during the class period incurring substantial additional losses.

class. Fed. R. Civ. P. 23(a). At the lead plaintiff selection stage, all that is required is a preliminary showing that the lead plaintiff's claims are typical and adequate. *See In re Fuwei Films Sec. Litig.*, 247 F.R.D. 432, 436 (S.D.N.Y. 2008) (“*Fuwei Films*”); *Linn v. Allied Irish Banks, PLC*, No. 02-cv-1738-DAB, 2004 WL 2813133, at *4 (S.D.N.Y. Dec. 8, 2004) (citations omitted).

a. The Claims of Movant Are Typical of Those of the Class

Typicality is demonstrated where “each class member’s claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant’s liability.” *Fuwei Films*, 247 F.R.D. at 436 (citing *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291 (2d Cir. 1992), *cert. denied*, 506 U.S. 1088 (1993)); *See also In re Initial Pub. Offering Sec. Litig.*, 214 F.R.D. 117, 121 (S.D.N.Y. 2002) (the movant’s claims must “arise from the same conduct from which the other class members’ claims and injuries arise.”). The movant’s claims do not, however, need to be identical to the other class members’ claims. *Fuwei Films*, 247 F.R.D. at 436; *Weinberg*, 216 F.R.D. at 253; *see also In re Prudential Sec. Inc. Ltd. P’Ships Litig.*, 163 F.R.D. 200, 208 (S.D.N.Y. 1995) (“The typicality requirement of Rule 23(a)(3) is liberally construed; and ‘typical’ does not mean ‘identical.’”)

Movant’s claims are typical of the claims of the Class. Movant purchased Magnum Hunter common stock during the Class Period at prices inflated by Defendants misrepresentations and omissions and suffered damages as the truth was publicly revealed. The factual and legal bases of Movant’s claims are substantially the same – if not identical to – those of the Class and are thus typical. Movant therefore satisfy Rule 23(a)(3)’s typicality requirement. *See Fuwei Films*, 247 F.R.D. at 437.

b. Movant Will Fairly and Adequately Protect the Interests of the Class

The adequacy of representation requirement of Rule 23(a)(4) is satisfied when a representative party establishes that it “will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). Representation is deemed adequate when the proposed lead plaintiff: (1) “has the ability and incentive to represent the claims of the class vigorously”; (2) “has obtained adequate counsel”; and (3) has no claims that “conflict [with the claims] asserted on behalf of the class.” *Acura Pharms.*, 2011 WL 91099, at *4 (citation omitted); *See Fuwei Films*, 247 F.R.D. at 436; *Constance Sczesny Trust v. KPMG LLP*, 223 F.R.D. 319, 324 (S.D.N.Y. 2004) (citations omitted).

Here, Movant will fairly and adequately represent the interests of the proposed Class. No antagonism exists between Movant’s interests and those of the absent Class members; rather, the interests of Movant and fellow Class members are squarely aligned. In addition, Movant has retained counsel highly experienced in prosecuting securities class actions vigorously and efficiently, and has timely submitted its choice to the Court for approval, in accordance with the PSLRA. See 15 U.S.C. §§ 78u-4(a)(3)(A)(i)(II) and (B)(v). Movant suffered substantial losses due to Defendants’ alleged fraud and, therefore, has a sufficient interest in the outcome of this case to ensure vigorous prosecution of the Action.

III. THE COURT SHOULD APPROVE MOVANT’S CHOICE OF COUNSEL

Pursuant to 15 U.S.C. § 77z-1(a)(3)(B)(v), a Lead Plaintiff is entitled to select and retain Lead Counsel for the Class, subject to the Court’s approval. *Fuwei Films*, 247

F.R.D. at 439. Movant has selected Finkelstein & Krinsk to be Lead Counsel for the Class and Zamansky & Associates as Liaison Counsel. As reflected in their respective firm resumes, Finkelstein & Krinsk and Zamansky & Associates each possess extensive experience litigating securities class actions, having successfully prosecuted numerous securities class actions and other complex litigation matters. Zamansky Decl. Exs. D and E. Accordingly, the Court should approve Movant's selection of Finkelstein & Krinsk LLP as Lead Counsel and Zamansky & Associates LLC as Liaison Counsel.

CONCLUSION

For the foregoing reasons, Movant respectfully requests that the Court: appoint Mary Pappas and the ILNAF Trust as Lead Plaintiff for the Class and approve their selection of Finkelstein & Krinsk LLP as Lead Counsel for the Class and Zamansky & Associates LLC as Liaison Counsel and grant such other relief as the Court may deem just and proper.

Dated: June 24, 2013

ZAMANSKY & ASSOCIATES LLC

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