

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

ANTHONY ROSIAN, Individually and on  
Behalf of All Others Similarly Situated,

Plaintiff,

v.

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

Defendants.

Civil Action No. 13-cv-02668-KBF

SHAUN FOSTER, Individually and on  
Behalf of All Others Similarly Situated,

Plaintiff,

v.

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

Defendants.

Civil Action No. 13-cv-02766-KBF

[additional captions on following page]

**MEMORANDUM OF LAW IN SUPPORT OF JOHN BOUGHNER'S MOTION FOR  
CONSOLIDATION OF RELATED ACTIONS, APPOINTMENT AS LEAD PLAINTIFF,  
AND APPROVAL OF HIS SELECTION OF COUNSEL**

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TEDDY ATCHLEY, Individually and on  
Behalf of All Others Similarly Situated,

Plaintiff,

v.

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

Defendants.

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Civil Action No. 13-cv-02969-KBF

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

Plaintiff,

v.

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

Defendants.

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Civil Action No. 13-cv-03446-KBF

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DAVID MACATTE, Individually and on  
Behalf of All Others Similarly Situated,

Plaintiff,

v.

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

Defendants.

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Civil Action No. 13-cv-03899-KBF

John Boughner (“Boughner”) respectfully submits this memorandum of law in support of his motion for: (1) consolidation of all related actions; (2) appointment as Lead Plaintiff pursuant to the Private Securities Litigation Reform Act of 1995 (the “PSLRA”), 15 U.S.C. § 78u-4(a)(3)(B); and (3) approval of his selection of Kessler Topaz Meltzer & Check, LLP (“Kessler Topaz”) as Lead Counsel.

## **I. PRELIMINARY STATEMENT**

Presently pending in this District are five securities class action lawsuits (the “Actions”) brought on behalf of all persons who purchased Magnum Hunter Resources Corp. (“Magnum Hunter” or the “Company”) securities between January 17, 2012 and April 22, 2013 (the “Class Period”).<sup>1</sup> The Actions allege violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the “Exchange Act”) as amended by the PSLRA (15 U.S.C. §§ 78j(b) and 78t), and Rule 10b-5 promulgated thereunder (17 C.F.R. § 240.10b-5), against Magnum Hunter and certain of its executive officers (collectively, “Defendants”).

The Actions should be consolidated because they involve common issues of law and fact.<sup>2</sup> See Fed. R. Civ. P. 42(a) (“Rule 42(a)”); § III.A., *infra*. After the Court’s ruling on consolidation, Boughner should be appointed as lead plaintiff because, to the best of his knowledge, his loss of approximately \$36,500 represents the largest financial interest in the relief

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<sup>1</sup> Generally, under the PSLRA, the longest pleaded class period controls at the lead plaintiff stage. See *Bhojwani v. Pistiolis*, 2007 U.S. Dist. LEXIS 52139, at \*14 (S.D.N.Y. 2007). As such, the class period alleged in *Foster v. Magnum Hunter Resources Corp., et al.*, No. 13-cv-02766-KBF (S.D.N.Y.), January 17, 2012 through April 22, 2013, is relied upon to assess Boughner’s financial interest.

<sup>2</sup> On May 16, 2013, this Court consolidated three of the above-captioned actions: *Rosian v. Magnum Hunter Resources Corp., et al.*, No. 13-cv-02668-KBF (S.D.N.Y.); *Foster v. Magnum Hunter Resources Corp., et al.*, No. 13-cv-02766-KBF (S.D.N.Y.); and *Atchley v. Magnum Hunter Resources Corp., et al.*, No. 13-cv-02969-KBF (S.D.N.Y.). See ECF No. 11. Unless otherwise noted, references to “ECF No. \_\_\_” are to filings in *Rosian v. Magnum Hunter Resources Corp., et al.*, No. 13-cv-02668-KBF (S.D.N.Y.).

sought by the class. *See* Declaration of Sean M. Handler in Support of John Boughner’s Motion for Consolidation of Related Actions, Appointment as Lead Plaintiff, and Approval of His Selection of Counsel (the “Handler Decl.”), Exs. A & B; *see also In re CMED Sec. Litig.*, 2012 U.S. Dist. LEXIS 47785, at \*6-13 (S.D.N.Y. Apr. 2, 2012) (Forrest, J.) (discussing the PSLRA’s process for selecting a lead plaintiff); *Sgalambo v. McKenzie*, 268 F.R.D. 170, 173 (S.D.N.Y. 2010) (same).

In addition to asserting the largest financial interest, Boughner readily satisfies the relevant requirements of Rule 23 of the Federal Rules of Civil Procedure because his claims are typical of all members of the class, and he will fairly and adequately represent the class. *See In re Tronox, Inc. Sec. Litig.*, 262 F.R.D. 338, 343-344 (S.D.N.Y. 2009). Finally, in accordance with the PSLRA, Boughner’s selection of lead counsel should be approved. *See* § IV, *infra*; *see also Sgalambo*, 268 F.R.D. at 177 (“[t]he most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class.”) (citation omitted) (brackets in original).

For the reasons set forth herein, Boughner respectfully requests that his motion be granted in its entirety.

## **II. SUMMARY OF THE PENDING ACTION**

Magnum Hunter is an 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, and North Dakota, as well as in Saskatchewan, Canada.

The Actions allege that during the Class Period, Defendants made numerous false and/or misleading statements, as well as failed to disclose materially adverse facts, about the Company’s business, operations, and prospects. Specifically, the Actions allege that Defendants

made false and/or misleading statements and/or failed to disclose that: (1) the Company had material weaknesses in its valuation of its oil and gas properties, its calculation of oil and gas reserves, its position with respect to certain tax matters, its accounting of its acquisition of NGAS Resources, Inc. (“NGAS”), and its compliance with certain debt covenants; (2) as a result of the foregoing, the Company lacked adequate internal and financial controls; and (3) as a result of the above issues, the Company’s statements were materially false and misleading at all relevant times.

On April 16, 2013, the Company disclosed in a Form 8-K filed with the Securities and Exchange Commission (“SEC”) that, at the direction of the Audit Committee of the Company’s Board of Directors, Magnum Hunter had dismissed its auditor, PricewaterhouseCoopers LLP (“PwC”), 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 the Company’s consolidated financial statements, including: (i) valuation of the Company’s oil and gas properties; (ii) calculation of the Company’s oil and gas reserves; (iii) the Company’s position with respect to certain tax matters; (iv) the Company’s accounting of its acquisition of NGAS; and (v) the Company’s compliance with certain debt covenants. On this news, shares of Magnum Hunter stock declined \$0.49 per share, or nearly 15%, from a close of \$3.32 per share on April 16, 2013 to close at \$2.83 per share on April 17, 2013.

Then, on April 22, 2013, Magnum Hunter disclosed in a Form 8-K/A filed with the SEC, that PwC disagreed with the Company’s previous characterization of their dismissal via a letter sent to the Company on April 18, 2013. PwC’s letter stated that: “[PwC] advised the Company that information came to [its] attention that [PwC] concluded materially impacts the fairness or

reliability of the Company’s consolidated financial statements and this issue was not resolved to [PwC’s] satisfaction prior to [PwC’s] dismissal.” On this news, the value of Magnum Hunter’s stock fell an additional \$0.13 per share, or nearly 5%, from a close of \$2.63 per share on April 19, 2013 (the prior trading day) to close at \$2.50 per share on April 22, 2013.

### III. ARGUMENT

#### A. Consolidation

The PSLRA provides that “[i]f more than one action on behalf of a class asserting substantially the same claim or claims arising under this title [] has been filed,” courts shall not appoint a lead plaintiff until “after the decision on the motion to consolidate is rendered.” 15 U.S.C. § 78u-4(a)(3)(B)(ii). There are at least five related securities class actions pending in this District on behalf of investors who purchased Magnum Hunter securities during the Class Period:

| <u>Abbreviated Case Name</u>                            | <u>Case Number</u> | <u>Date Filed</u> |
|---|--------------------|-------------------|
| <i>Rosian v. Magnum Hunter Resources Corp., et al.</i>  | 13-cv-02668-KBF    | April 23, 2013    |
| <i>Foster v. Magnum Hunter Resources Corp., et al.</i>  | 13-cv-02766-KBF    | April 25, 2013    |
| <i>Atchley v. Magnum Hunter Resources Corp., et al.</i> | 13-cv-02969-KBF    | May 2, 2013       |
| <i>Pappas v. Magnum Hunter Resources Corp., et al.</i>  | 13-cv-03446-KBF    | May 22, 2013      |
| <i>Macatte v. Magnum Hunter Resources Corp., et al.</i> | 13-cv-03899-KBF    | June 7, 2013      |

Under Rule 42(a), consolidation is appropriate where the actions involve common questions of law or fact. *See Tronox*, 262 F.R.D. at 344; *see also CMED*, 2012 U.S. Dist. LEXIS 47785, at \*3-6. Here, the Actions present nearly identical factual and legal issues arising out of the same alleged course of misconduct and involve the purchase of Magnum Hunter securities by investors at artificially inflated prices during the Class Period. Moreover, as noted above, this Court has previously consolidated the *Rosian*, *Foster*, and *Atchley* actions. *See* ECF No. 11.

Accordingly, consolidation is appropriate. *See Tronox*, 262 F.R.D. at 344.

**B. The PSLRA's Lead Plaintiff Provisions**

The PSLRA establishes the procedures for selecting a lead plaintiff in class action lawsuits alleging violations under the federal securities laws. *See* 15 U.S.C. § 78u-4(a); *see also CMED*, 2012 U.S. Dist. LEXIS 47785, at \*6-13 (discussing the PSLRA's process for selecting a lead plaintiff).

First, the plaintiff who files the initial action must publish a notice to the class within twenty days, informing class members of their right to file a motion for appointment as lead plaintiff. *See* 15 U.S.C. § 78u-4(a)(3)(A)(i). Second, within sixty days of the publication of the initial notice, any person who is a member of the proposed class may apply to be appointed as lead plaintiff, whether or not they have previously filed a complaint in the action. *See* 15 U.S.C. § 78u-4(a)(3)(A)(i)(II). Third, the PSLRA provides that within ninety days after publication of the initial notice, courts are to consider any motion made by a class member and appoint as lead plaintiff the member or members of the class that the court determines to be most capable of adequately representing the interests of class members. *See* 15 U.S.C. § 78u-4(a)(3)(B)(i). In determining the "most adequate plaintiff," the PSLRA provides that:

[T]he court shall adopt a presumption that the most adequate plaintiff in any private action arising under this [Act] is the person or group of persons that –

- (aa) has either filed the complaint or made a motion in response to a notice...;
- (bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and
- (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure.

15 U.S.C. § 78u-4(a)(3)(B)(iii)(I); *see also CMED*, 2012 U.S. Dist. LEXIS 47785, at \*9.

Here, in connection with the filing of the first-filed action, *Rosian v. Magnum Hunter Resources Corp., et al.*, No. 13-cv-02668-KBF (S.D.N.Y. filed Apr. 23, 2013), notice was

published on *Business Wire* on April 23, 2013. *See* Handler Decl., Ex. C. Thus, the time period in which class members may move to be appointed lead plaintiff in the case expires on June 24, 2013. *See* 15 U.S.C. § 78u-4(a)(3)(A). Pursuant to the PSLRA's provisions, and within the requisite time frame after publication of the required notice, Boughner timely moves this Court to be appointed lead plaintiff on behalf of all members of the class. *See Kaplan v. Gelfond*, 240 F.R.D. 88, 92 (S.D.N.Y. 2007). In addition, Boughner has selected and retained counsel experienced in the prosecution of securities class actions to represent the class. *See* Handler Decl., Ex. D. Accordingly, Boughner satisfies the PSLRA's filing requirements for seeking appointment as lead plaintiff.

**C. Boughner is the "Most Adequate Plaintiff"**

**1. Boughner has the Largest Financial Interest in the Relief Sought by the Class**

During the Class Period, Boughner suffered a loss of approximately \$36,500 in connection with his Class Period transactions in Magnum Hunter securities under either a first-in first-out ("FIFO") or last-in first-out ("LIFO") basis. *See* Handler Decl., Exs. A & B; *see also Bo Young Cha v. Kinross Gold Corp.*, 2012 U.S. Dist. LEXIS 79288, at \*9 (S.D.N.Y. May 31, 2012) (noting that the "trend both in this district and nationwide has been to use LIFO to calculate such losses"). All 10,000 shares purchased by Boughner during the Class Period were retained through the end of the Class Period. *See In re eSpeed, Inc. Sec. Litig.*, 232 F.R.D. 95, 100 (S.D.N.Y. 2005) (applying the four financial interest factors (the "*Lax* factors") set forth in *Lax v. First Merch. Acceptance Corp.*, Nos. 97 Civ. 2715, *et al.*, 1997 WL 461036 (N.D. Ill. Aug. 11, 1997)). To the best of Boughner's knowledge, there are no other applicants seeking lead plaintiff appointment that have a larger financial interest in the litigation. *See Sgalambo*, 268 F.R.D. at 173.

**2. Boughner Satisfies the Relevant Requirements of Rule 23**

In addition to possessing the largest financial interest in the relief sought by the class, the lead plaintiff must also “otherwise satisf[y] the requirements of Rule 23 of the Federal Rules of Civil Procedure.” 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(cc). Rule 23(a) provides that a party may serve as a class representative if the following four requirements are satisfied: “(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.” Although Rule 23 consists of four requirements, at this stage, a movant “need only make ‘a preliminary showing that it satisfies the typicality and adequacy requirements of [Rule 23].’” *Tronox*, 262 F.R.D. at 344 (citation omitted) (brackets in original); *see also CMED*, 2012 U.S. Dist. LEXIS 47785, at \*12-13. As demonstrated herein, Boughner satisfies these requirements.

**a. Boughner is Typical**

Under Rule 23(a)(3), the claims or defenses of the representative party must be typical of those of the class. Typicality “is satisfied when 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.” *Tronox*, 262 F.R.D. at 344.

Here, Boughner is typical because, just like all other class members asserting claims under the Exchange Act, he: (1) purchased or otherwise acquired Magnum Hunter securities during the Class Period; (2) at prices allegedly artificially inflated by Defendants’ materially false and misleading statements and/or omissions; and (3) suffered damages when corrective disclosures removed the inflation caused by the Defendants’ conduct causing the price of Magnum Hunter securities to fall. *See id.* Thus, Boughner’s claims are typical of other class

members' claims because both his and the class's claims arise out of the same course of events and are predicated on identical theories of liability and damages. *See id.*

**b. Boughner is Adequate**

The adequacy requirement of Rule 23(a)(4) is met if the representative party makes a showing that it will "fairly and adequately protect the interests of the class." Specifically, the adequacy requirement is fulfilled when the plaintiff "seeks identical relief on identical claims based on identical legal theories making their interests not antagonistic with other class members." *Tronox*, 262 F.R.D. at 345.

Here, there are no conflicts between Boughner and the class as each seeks to recover losses caused by Defendants' false and misleading statements. Moreover, Boughner has demonstrated his adequacy through his selection of Kessler Topaz as lead counsel to represent the class in this action. *See id.* at 344 (adequacy requires retention of "counsel that is capable and qualified to vigorously represent the interests of the class"). As discussed more fully below, Kessler Topaz is highly qualified and experienced in the area of securities class action litigation and has repeatedly demonstrated its ability to prosecute complex securities class action lawsuits. *See* § IV, *infra*.

**IV. The Court Should Approve Boughner's Selection Of Counsel**

The PSLRA vests authority in the lead plaintiff to select and retain lead counsel, subject to the Court's approval. *See Sgalambo*, 268 F.R.D. at 177. The Court should not disturb a lead plaintiff's choice of counsel unless it is necessary to "protect the interests of the class." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II)(aa). Because Boughner has selected counsel experienced in litigating securities fraud class actions with the resources to prosecute this action to the greatest recovery possible for the class, Boughner's choice of lead counsel should be approved.

Boughner has selected Kessler Topaz to serve as lead counsel for the class. Kessler Topaz specializes in prosecuting complex class action litigation and is one of the leading law firms in its field. Kessler Topaz is actively engaged in complex litigation and has successfully prosecuted (or is currently prosecuting) numerous securities class actions on behalf of injured investors, including: *In re Tyco Int'l, Ltd. Securities Litigation*, No. 02-1335-B (D.N.H.) (\$3.2 billion recovery); *In re Bank of America Corp. Securities, Derivative, and Employment Retirement Income Security Act (ERISA) Litigation*, No. 09-MDL-2058 (PKC) (S.D.N.Y.) (\$2.425 billion recovery); *In re Wachovia Preferred Securities and Bond/Notes Litigation*, No. 09-cv-06351 (S.D.N.Y.) (\$627 million recovery); *In re Lehman Brothers Equity/Debt Securities Litigation*, No. 08-cv-5523 (S.D.N.Y.) (\$516 million partial recovery); and *In re Tenet Healthcare Corp. Securities Litigation*, No. CV-02-8462-RSWL (Rx) (C.D. Cal.) (\$215 million recovery). See Handler Decl., Ex. D. Accordingly, the Court can be assured that the appointment of Kessler Topaz will provide the class efficient, yet the highest caliber, representation.

**V. CONCLUSION**

For the reasons set forth above, Boughner respectfully requests that the Court: (1) consolidate all related actions; (2) appoint Boughner to serve as Lead Plaintiff pursuant to the PSLRA; and (3) approve Boughner's selection of Kessler Topaz as Lead Counsel for the class.

Dated: June 24, 2013

Respectfully Submitted,

**KESSLER TOPAZ  
MELTZER & CHECK LLP**

/s/ Sean M. Handler

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