UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

HORACE CARVALHO, Individually and on Behalf of All Others Similarly Situated, Plaintiff v. MAGNUM HUNTER RESOURCES CORP, et al. Defendant	**No. 4:13-cv-1166** **CLASS ACTION**
DAVID MAINGOT, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. MAGNUM HUNTER RESOURCES CORP, et al. Defendants.	**No. 4:13-cv-1289** **CLASS ACTION**

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION BY THE DELAWARE COUNTY EMPLOYEES RETIREMENT FUND AND ROBERT D'AGOSTA FOR APPOINTMENT AS LEAD PLAINTIFF AND APPROVAL OF LEAD COUNSEL

The Delaware County Employees Retirement Fund ("DelCo") and Robert D'Agosta ("D'Agosta") respectfully submit this Memorandum of Law in support of his 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") and Rule 42 of the Federal Rules of Civil Procedure, for an Order: (1) appointing DelCo and Agosta as Lead Plaintiff on behalf of all persons who purchased or otherwise acquired securities of Magnum Hunter Resources Corp. ("Magnum Hunter" or the "Company") during the Class Period, pursuant to Section 21D(a)(3)(B) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78u-4(a)(3)(B), as amended by the Private Securities Litigation Reform Act of 1995 (the "PSLRA"); (2) approving Lead Plaintiff's selection of Pomerantz Grossman Hufford Dahlstrom & Gross LLP ("Pomerantz") and Chimicles & Tikellis LLP ("Chimicles") as Lead Counsel and Abraham Watkins Nichols Sorrels Agosto & Friend ("Abraham Watkins") as Liaison Counsel for the Class; and (3) granting such other and further relief as the Court may deem just and proper.

I. PRELIMINARY STATEMENT

Pursuant to the PSLRA, the court appoints as lead plaintiff the movant who possesses the largest financial interest in the outcome of the action and who satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). DelCo and Agosta, with a loss of approximately $88,718 in connection with their purchases of Magnum Hunter securities during the Class Period have the largest financial interest in the relief sought in this action. DelCo and Agosta further satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure as they are an adequate representative with claims typical of the other Class

members. Accordingly, DelCo and Agosta respectfully submit that they should be appointed Lead Plaintiff.

II. STATEMENT OF FACTS

Magnum Hunter is based in Houston, Texas and is an independent exploration and production company engaged in the acquisition, development and production of crude oil, natural gas and natural gas liquids, primarily in West Virginia, Kentucky, Ohio, Texas, North Dakota and Saskatchewan, Canada. The Company is active in five of the most prolific unconventional shale resource plays in North America, namely the Marcellus Shale, Utica Shale, Eagle Ford Shale, Pearsall Shale and Williston Basin/Bakken Shale. Magnum Hunter is listed under the ticker symbol "MHR" on the NYSE. During the Class Period, Defendants issued materially false and misleading statements and omitted to state material facts that rendered their affirmative statements misleading as they related to the Company's business, operations, and prospects.

Specifically, on March 18, 2013, Magnum Hunter announced that it would delay filing its annual report on Form 10-k for the year ended December 31, 2012. The Company attributed its delay to the discovery of "certain material weaknesses in its internal controls over financial reporting." Thereafter, on April 16, 2013, Magnum Hunter announced that the Company had dismissed PricewaterhouseCoopers LLP ("PwC") as the Company's independent registered public auditor effective immediately. PwC, according to Magnum Hunter, had identified certain issues in the Company's financial reporting, including: (i) that information had come to PwC's attention that if further investigated may have a material impact on the fairness or reliability of the Company's consolidated financial statements, and this information was not further investigated and resolved to PwC's satisfaction prior to its dismissal, and (ii) of the

need to significantly expand the scope of PwC's audit of the Company's consolidated financial statements for the fiscal year ended December 31, 2012.

On this news, the Company's shares declined $0.49 per share, or over 14.5%, to close on April 17, 2013, at $2.83 per share.

III. ARGUMENT

A. DELCO AND AGOSTA SHOULD BE APPOINTED LEAD PLAINTIFF

Section 21D(a)(3)(B) of the PSLRA sets forth procedures for the selection of Lead Plaintiff in class actions brought under the Exchange Act. The PSLRA directs courts to consider any motion to serve as Lead Plaintiff filed by class members in response to a published notice of class action by the later of (i) 90 days after the date of publication, or (ii) as soon as practicable after the Court decides any pending motion to consolidate. 15 U.S.C. § 78u-4(a)(3)(B)(i) &(ii).

Further, under 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I), the Court is directed to consider all motions by plaintiffs or purported class members to appoint lead plaintiff filed in response to any such notice. Under this section, the Court "shall" appoint "the presumptively most adequate plaintiff" to serve as lead plaintiff and shall presume that plaintiff 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).

As set forth below, DelCo and Agosta satisfiy all three of these criteria and thus are entitled to the presumption that they are the most adequate plaintiff of the Class and, therefore, should be appointed Lead Plaintiff for the Class.

1. DelCo and Agosta are Willing to Serve as Class Representative

On April 24, 2013 counsel in this action caused a notice (the "Notice") to be published over *Globe Newswire* pursuant to Section 21D(a)(3)(A)(i) of the PSLRA, which announced that a securities class action had been filed against the defendants herein, and advised investors of Magnum securities that they have until June 24, 2013, to file a motion to be appointed as Lead Plaintiff. *See* PSLRA Notice, Ex. A.

DelCo and Agosta have filed the instant motion pursuant to the Notice, and have attached a Certification attesting they are willing to serve as a class representative for the Class and provide testimony at deposition and trial, if necessary. *See* DelCo and Agosta Certifications, Ex. B. Accordingly, DelCo and Agosta satisfy the first requirement to serve as Lead Plaintiff for the Class.

2. DelCo and Agosta Have the "Largest Financial Interest"

The PSLRA requires a court to adopt a rebuttable presumption that "the most adequate plaintiff . . . is the person or group of persons that . . . has the largest financial interest in the relief sought by the class." 15 U.S.C. § 78u-4(a)(3)(B)(iii).

As of the time of the filing of this motion, DelCo and Agosta believe that they have the largest financial interest of any of the Lead Plaintiff movants based on the four factors articulated in the seminal case *Lax v. First Merchants Acceptance Corp.*, 1997 WL 461036, at *5 (N.D. Ill. 1997) (financial interest may be determined by (1) the number of shares purchased during the

class period; (2) the number of net shares purchased during the class period; (3) the total net funds expended during the class period; and (4) the approximate losses suffered).[1]

Here, DelCo and Agosta: 1) purchased 52,886 shares of MHR common stock during the Class Period; 2) expended $395,826 on their purchases of MHR shares during the Class Period; 3) suffered losses of $88,718 as a result of their MHR investments during the Class Period; and 4) retained 11,790 shares. *See* DelCo and Agosta Loss Chart, Ex. C. Because DelCo and Agosta possess the largest financial interest in the outcome of this litigation, they may be presumed to be the "most adequate" plaintiff. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb). *See In re Enron Corp. Sec. Litig.*, 206 F.R.D. 427, 440 (S.D. Tex. 2002); *Bell v. Ascendant Solutions, Inc.*, 2002 U.S. Dist. LEXIS 6850, at *12-*17 (N.D. Tex. Apr. 17, 2002).

3. DelCo and Agosta Otherwise Satisfy the Requirements of Rule 23 of the Federal Rules of Civil Procedure

Section 21D(a)(3)(B)(iii)(I)(cc) of the PSLRA further provides that, in addition to possessing the largest financial interest in the outcome of the litigation, a Lead Plaintiff must "otherwise satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure." *See In re Cendant Corp. Litig.*, 264 F.3d 201, 263 (3d Cir. 2001), *cert. denied*, 535 U.S. 929 (2002). Rule 23(a) generally provides that a class action may proceed 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.

[1] *See also In re Olsten Corp. Sec. Litig.*, 3 F. Supp.2d 286, 296 (E.D.N.Y. 1998). *Accord In re Comverse Tech., Inc., Sec. Litig.*, 2007 U.S. Dist. LEXIS 14878, at *22-*25 (E.D.N.Y. Mar. 2, 2007) (collectively, the "*Lax-Olsten*" factors.

In making its determination that Lead Plaintiff satisfies the requirements of Rule 23, the Court need not raise its inquiry to the level required in ruling on a motion for class certification; instead a *prima facie* showing that the movant satisfies the requirements of Rule 23 is sufficient. *Greebel v. FTP Software*, 939 F. Supp. 57, 60 (D. Mass. 1996). Moreover, "typicality and adequacy of representation are the only provisions relevant to a determination of lead plaintiff under the PSLRA." *In re Oxford Health Plans, Inc. Sec. Litig.*, 182 F.R.D. 42, 49 (S.D.N.Y. 1998) (citing *Gluck v. Cellstar Corp.*, 976 F. Supp. 542, 546 (N.D. Tex. 1997)). *See also Olsten*, 3 F. Supp. 2d at 296; *Bell*, 2002 U.S. Dist. LEXIS 6850, at *17; *Enron*, 206 F.R.D. at 441 ("Typicality and adequacy are directly relevant to the choice of the Lead Plaintiff as well as the class representative in securities fraud class actions.").

The typicality requirement of Fed. R. Civ. P. 23(a)(3) is satisfied where the named representative's claims have the "same essential characteristics as the claims of the class at large." *Danis v. USN Communs., Inc.*, 189 F.R.D. 391, 395 (N.D. Ill. 1999). "'Typicality does not require a complete identity of claims. Rather, the critical inquiry is whether the class representative's claims have the same essential characteristics of those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality.'" *James v. City of Dallas, Tex.*, 254 F.3d 551, 571 (5th Cir. 2001) quoting 5 James Wm. Moore, et al., *Moore's Federal Practice* ¶ 23.24[4] (3d ed. 2000)). Indeed, the "similarity of legal theory may control even where factual distinctions exist between the claims of the named representatives and the other class members." *Danis*, 189 F.R.D. at 395.

The claims of DelCo and Agosta are typical of those of the Class. They allege, as do all class members, that defendants violated the Exchange Act by making what they knew or should have known were false or misleading statements of material facts concerning Magnum Hunter,

or omitted to state material facts necessary to make the statements they did make not misleading. DelCo and Agosta, as did all members of the Class, purchased Magnum Hunter securities during the Class Period at prices artificially inflated by defendants' misrepresentations or omissions and was damaged upon the disclosure of those misrepresentations and/or omissions. These shared claims, which are based on the same legal theory and arise from the same events and course of conduct as the Class claims, satisfy the typicality requirement of Rule 23(a)(3).

The adequacy of representation requirement of Rule 23(a)(4) is satisfied where it is established that a representative party "will fairly and adequately protect the interests of the class." The class representative must also have "sufficient interest in the outcome of the case to ensure vigorous advocacy." *Riordan v. Smith Barney*, 113 F.R.D. 60, 64 (N.D. Ill. 1986). *See Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 626 (5th Cir. 1999) (indicating that "differences between named plaintiffs and class members render the named plaintiffs inadequate representatives only if those differences create conflicts between the named plaintiffs' interests and the class members' interests.").

DelCo and Agosta adequately represent the Class. There is no antagonism between DelCo and Agosta's interests and those of the Class, and their losses demonstrate that they have a sufficient interest in the outcome of this litigation. Moreover, DelCo and Agosta have retained counsel highly experienced in vigorously and efficiently prosecuting securities class actions such as this action, and submits his choice to the Court for approval pursuant to 15 U.S.C. § 78u-4(a)(3)(B)(v).

4. DelCo and Agosta Will Fairly and Adequately Represent the Interests of the Class and is Not Subject to Any Unique Defenses

The presumption in favor of appointing Sanford as Lead Plaintiff may be rebutted only upon proof "by a purported member of the plaintiffs' class" that the presumptively most adequate plaintiff:

> (aa) will not fairly and adequately protect the interest of the class; or
>
> (bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class.

15 .S.C. § 78u-4(a)(3)(b)(iii)(I).

DelCo and Agosta's ability and desire to fairly and adequately represent the Class has been discussed above. DelCo and Agosta are not aware of any unique defenses defendants could raise that would render them inadequate to represent the Class. Accordingly, DelCo and Agosta should be appointed Lead Plaintiff for the Class.

5. DelCo and Agosta Are an Appropriate Lead Plaintiff Group

The appointment of a group of class members as Lead Plaintiff is expressly permitted by the PSLRA, as courts in this District and the majority of courts throughout the country have recognized. *Friedman v. Quest Energy Partners LP*, 261 F.R.D. 607, 614-615 (W. D. Okla. 2009) (agreeing that the PSRLA "allows for a group of persons to serve as lead plaintiff"); *Takara Trust v. Molex Inc.*, 229 F.R.D. 577, 579 (N.D. Ill. 2005) (holding that the PSLRA permits appointment of a "person or group of persons" and appointing a group with the largest financial interest as lead plaintiff); *Dollens v. Zionts*, 2001 U.S. Dist. LEXIS 19966, at *18 n.7 (N.D. Ill. Dec. 4, 2001) (explaining that appointment of a lead plaintiff group is appropriate under the PSLRA provided that the group will "fairly and adequately protect the interests of the class."). Thus, a "member or members" of the class or a "person or persons" may combine to

constitute the "largest financial interest" and thereby jointly serve as the most adequate plaintiff so long as they represent the largest financial interest. U.S.C. § 78u-4(a)(3)(B)(I). See *Meyer v. Paradigm Med. Indus.*, 225 F.R.D. 768, 681 (D. Utah 2004) (quoting *In re Ribozyme Pharm., Inc. Sec. Litig.*, 192 F.R.D. 656, 659 (D. Colo. 2000)).

Here, DelCo and Agosta are a small, cohesive group two-member group, well within the acceptable limits of group size. As such, DelCo and Agosta are an appropriate group because they share the same goals and objectives, and are determined to jointly seek appointment as Lead Plaintiff. Because DelCo and Agosta are a small, cohesive group of sophisticated investors, their financial interests are properly aggregated for purposes of this motion.

C. LEAD PLAINTIFF'S SELECTION OF COUNSEL SHOULD BE APPROVED

The PSLRA vests authority in the Lead Plaintiff to select and retain lead counsel, subject to the approval of the Court. 15 U.S.C. § 78u-4(a)(3)(B)(v). The Court should interfere with Lead Plaintiff's selection only when necessary "to protect the interests of the class." 15 U.S.C.§ 78u-4(a)(3)(B)(iii)(II)(aa). *See Cendant*, 264 F.3d at 276 (emphasizing that the PSLRA "evidences a strong presumption in favor of approving a properly-selected lead plaintiff's decisions as to counsel selection and counsel retention.").

Here, DelCo and Agosta have selected Pomerantz and Chimicles as Lead Counsel, and Abraham Watkins as Liaison Counsel. Pomerantz, Chimicles and Abraham Waktins are highly experienced in the area of securities litigation and class actions, and have successfully prosecuted numerous securities litigations and securities fraud class actions on behalf of investors as detailed in the firm's resumes. *See* Pomerantz, Chimicles and Abraham Watkins Firm Resumes, Exhibit D, E and F. As a result of the firm's extensive experience in litigation involving issues similar to those raised in this action, DelCo and Agosta's counsel has the skill and knowledge

which will enable them to prosecute this action effectively and expeditiously. Thus, the Court may be assured that by approving DelCo and Agosta's selection of Counsel, the members of the class will receive the best legal representation available.

IV. CONCLUSION

For the foregoing reasons, DelCo and Agosta respectfully requests the Court to issue an Order: (1) appointing DelCo and Agosta as Lead Plaintiff; (2) approving Pomerantz and Chimicles as Lead Counsel, and Abraham Watkins as Liaison Counsel; and, (3) granting such other relief as the Court may deem to be just and proper.

Dated: June 24, 2013
New York, New York

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