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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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ANTHONY ROSIAN, Individually and on :
Behalf of All Others Similarly Situated, :

Plaintiff, :

-v- :

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

Defendants. :

-----X

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. :

-----X

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. :

-----X

13 Civ. 2668 (KBF)

MEMORANDUM
DECISION & ORDER

13 Civ. 2766 (KBF)

13 Civ. 2969 (KBF)

-----X
 MARY PAPPAS, Individually and on Behalf :
 of All Others Similarly Situated, :
 :
 Plaintiff, : 13 Civ. 3446 (KBF)
 -v- :
 :
 MAGNUM HUNTER RESOURCES :
 CORPORATION, GARY C. EVANS, :
 RONALD D. ORMAND, and FRED J. :
 SMITH, JR., :
 :
 Defendants. :

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 :
 DAVID MACATTE, Individually and on :
 Behalf of All Others Similarly Situated, :
 :
 Plaintiff, : 13 Civ. 3899 (KBF)
 -v- :
 :
 MAGNUM HUNTER RESOURCES CORP., :
 GARY C. EVANS, RON ORMAND, JAMES :
 W. DENNY, III, and H.C. "KIP" :
 FERGUSON, III, :
 :
 Defendants. X

 KATHERINE B. FORREST, District Judge:

Currently pending before the Court are six competing motions to appoint lead plaintiff and lead counsel in this consolidated putative class action brought pursuant to Section 21D(a)(3)(B) of the Securities Exchange Act of 1934, as amended by the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-4(a)(3)(B) (2010).¹ Plaintiffs in this action, purchasers of Magnum Hunter

¹ This action is the result of consolidating four separate related cases with Rosian v. Magnum Hunter Resources Corp. et al., 13 Civ. 2668. On May 16, 2013, the Court consolidated Foster v. Magnum Hunter Resources Corp. et al., 13 Civ. 2766, and Atchley v. Magnum Hunter Resources Corp. et al., 13 Civ. 2969, with this case. (ECF No. 11.) On June 25, 2013, the Court consolidated

Resources Corporation (“Magnum Hunter”) securities between January 17, 2012, and April 22, 2013, have sued Magnum Hunter and certain of its officers and directors based on alleged misrepresentation of the company’s financial condition. (Compl. ¶¶ 1, 5, 11–16, ECF No. 1.)

The following six Movants seek appointment as lead plaintiff and approval of their selection of counsel: Tuan Thanh Ly (ECF No. 17), Mary Pappas and the ILNAF Trust (“the Pappas Group”) (ECF No. 21), the Magnum Hunter Investor Group (“the Kelly Group”) (ECF No. 24),² Edward Paige (ECF No. 35), the Delaware County Employees Retirement Fund and Robert D’Agosta (“the D’Agosta Group”) (ECF No. 38), and the Magnum Hunter Institutional Investor Group (“the Macomb Group”) (ECF No. 40).³

For the reasons set forth below, Movant Edward Paige’s motion is GRANTED, and the remaining five motions are DENIED.

DISCUSSION

I. Appointment of Lead Plaintiff

A. Largest Financial Interest

Pursuant to the PSLRA, the Court “shall appoint as lead plaintiff the member or members of the purported plaintiff class that the Court determines to be

Pappas v. Magnum Hunter Resources Corp. et al., 13 Civ. 3446, with this case. (ECF No. 43.) On October 3, 2013, the Court consolidated Macatte v. Magnum Hunter Resources Corp. et al., 13 Civ. 3899, with this case.

² The Magnum Hunter Investor Group is composed of individuals Jason Kelly, Anne Sanders, Darren Sanders, Raymond Sandler, and James Carlson. (Mem. of L. in Supp. of Mot. of Magnum Hunter Investor Grp. 1, ECF No. 26.)

³ The Magnum Hunter Institutional Investor Group is composed of three institutions: Macomb County Employees’ Retirement System, IBEW Local Union No. 58 Annuity Fund, and Iron Workers District Council of New England Pension Fund. (Mem. of L. in Supp. of Magnum Hunter Institutional Investor Grp.’s Mot. 1, ECF No. 41.)

most capable of adequately representing the interests of class members.” 15 U.S.C. § 78u-4(a)(3)(B)(i). The PSLRA creates a “[r]ebutable 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,” provided that such person or persons satisfies the requirements of Rule 23. Id. § 78u-1(a)(3)(B)(iii)(I)(aa)–(cc). The presumption may be rebutted upon a showing that the presumptive lead plaintiff “will not fairly or adequately protect the interests of the class” or “is subject to unique defenses that render such plaintiff incapable of adequately representing the class.” Id. § 78u-4(1)(a)(3)(B)(iii)(II)(aa)–(bb).

In determining which putative lead plaintiff has the largest financial interest, courts generally examine the four Lax factors: (1) the number of shares purchased; (2) the number of net shares purchased; (3) the net funds expended by the plaintiffs during the class period; and (4) the approximate losses suffered by the plaintiffs. Richman v. Goldman Sachs Grp., Inc., 274 F.R.D. 473, 475 (S.D.N.Y. 2011) (citing Lax v. Merchs. Acceptance Corp., 1997 WL 461036 (N.D. Ill. Aug. 11, 1997)). While courts in this Circuit “weigh” and “balance” the factors against each other, they usually consider the fourth factor—approximate loss—to be the most significant. See Richman, 274 F.R.D. at 475. Courts in this district have a “very strong preference” for the “last-in, first-out” method of calculating losses. Id. at 473.

Applying these four factors, the Court finds that Movant Paige has the largest financial interest in the action.

First, the Court easily dismisses the claims of Ly, the Pappas Group, the Kelly Group, and the D'Agosta Group. Their estimated losses, using the LIFO method, fall below the estimated losses of Paige and the Macomb Group, even after disaggregating the Macomb Group and considering each of its members individually. The following chart sets forth the parties' estimated LIFO losses:

Movant	Estimated LIFO losses
Ly	\$59,608 (Seidman Decl. Ex. 4, ECF No. 19)
Pappas Group	\$34,600 (Zamansky Decl. Ex. C, ECF No. 22)
Kelly Group	\$16,873 (Fearon Decl. Ex. 3, ECF No. 25)
Paige	\$324,229 (Bunch Decl. Ex. C, ECF No. 37)
D'Agosta Group	\$88,718 (Mem. L. in Supp. of Mot. by Del. Cnty. Emps. Ret. Fund Ex. C, ECF No. 39)
Macomb Group	\$528,962 (Rosenfeld Decl. Ex. C, ECF No. 42)
Macomb	\$246,417 (<u>Id.</u>)
Local No. 58	\$177,394 (<u>Id.</u>)
Iron Workers	\$105,152 (<u>Id.</u>)

Both Paige and the Macomb Group contend that they have the largest financial interest in the litigation. Paige acknowledges that the Macomb Group's aggregate LIFO loss is higher than his own, but argues that it cannot satisfy the requirements of Rule 23, and therefore "will not fairly or adequately protect the interests of the class," as required by the PSLRA, 15 U.S.C. § 78u-4(1)(a)(3)(B)(iii)(II)(aa)–(bb). (Mem. in Further Supp. of Mot. of Movant Paige ("Paige Reply") 10, ECF No. 55.) Thus, Paige argues, this Court must disaggregate the Macomb Group and consider each of the three constituent investors separately

in before appointing a lead plaintiff.⁴ (Id.) This Court agrees that disaggregation is appropriate.

Though the PSLRA expressly permits “a person or group of persons” to be appointed lead plaintiff, 15 U.S.C. § 78u-4(a)(3)(B), it does not define “group” or how a group’s members must be related. Courts are divided as to whether the phrase “members” allows for aggregation of unrelated investors as a “group” for purposes of lead plaintiff status. Compare, e.g., Beckman v. Ener1, Inc., No. 11 Civ. 5794 (PAC), 2012 WL 512651, at *4 (S.D.N.Y. Feb. 15, 2012) (disaggregating a group of investors); with Richman, 274 F.R.D. at 480 (appointing a group of pension funds as lead plaintiff).

While courts in this District are sometimes willing to appoint groups of investors, such movants must show that group appointment is appropriate on a case-by-case basis. “Accordingly, a proposed group must proffer an evidentiary showing that unrelated members of a group will be able to function cohesively and to effectively manage the litigation apart from their lawyers.” Varghese v. China Shenghuo Pharm. Holdings, Inc., 589 F. Supp. 2d 388, 393 (S.D.N.Y. 2008). Courts consider various factors in this inquiry, including “(1) the existence of a pre-litigation relationship between group members; (2) involvement of the group members in the litigation thus far; (3) plans for cooperation; (4) the sophistication of

⁴ Paige also argues that two of the other Lax factors—net shares purchased and net expenditures—favor him even if he is compared against the aggregated Macomb Group. (Mem. in Further Supp. of Mot. of Movant Paige 12, ECF No. 55.) The Court agrees that those two factors favor Paige. However, because the Court disaggregates the Macomb Group and considers each investor separately, it need not consider those two factors to reach its decision.

its members; and (5) whether the members chose outside counsel, and not vice versa.” Id.

The Macomb Group has not alleged facts sufficient to show the cohesiveness necessary to achieve appointment as lead plaintiff. The Group argues that “it is a small, cohesive group of pension funds that is dedicated to pursuing this action.” (Magnum Hunter Inst. Investor Grp.’s Mem. in Further Supp. of Mot. for App’t as Lead Pl. 5, ECF No. 54.) However, the Group’s declaration in support of its motion does not allege that the members of the group have any pre-litigation relationship. In fact, the Group acknowledges that it was formed specifically to “file a joint motion for appointment as lead plaintiff.” (See Rosenfeld Decl. Ex. B (Joint Declaration) 2, ECF No. 42.)

Accordingly, the Court finds insufficient “evidence that the members of the group will act collectively and separately from their lawyers.” In re Tarragon Corp. Secs. Litig., 2007 WL 4302732 (PKC) (S.D.N.Y. Dec. 6, 2007); see also In re Razorfish, Inc. Secs. Litig., 143 F. Supp. 2d 304, 308–09 (S.D.N.Y. 2001) (rejecting a putative group because it lacked an independent existence, its members had no prior relationship, and it appeared to be no more than “artifice cobbled together by cooperating counsel”). The fact that the Group proposes the appointment of two law firms as co-lead counsel to represent it does not help its cause. See In re Donkenny Inc. Secs. Litig., 171 F.R.D. 156, 158 (S.D.N.Y. 1997) (“To allow lawyers to designate unrelated plaintiffs as a ‘group’ and aggregate their financial stakes would allow and encourage lawyers to direct the litigation.”).

The Court therefore disaggregates the group sua sponte and considers its members as individual contenders for lead plaintiff. See, e.g., Beckman, 2012 WL 512651, at *4. On that basis, Paige has the greatest estimated losses, in addition to the greatest net shares purchased and net funds expended. Because he has the largest financial interest based on all three metrics, he is presumptively the lead plaintiff.

Movant	Estimated LIFO losses
Paige	\$324,229 (Bunch Decl. Ex. C)
Macomb	\$246,417 (Rosenfeld Decl. Ex. C)
Local No. 58	\$177,394 (Rosenfeld Decl. Ex. C)
Iron Workers	\$105,152 (Rosenfeld Decl. Ex. C)

B. Rule 23 Requirements

For appointment of lead plaintiff, the PSLRA mandates that an appointed lead plaintiff make a preliminary showing that it meets the requirements of Rule 23 of the Federal Rules of Civil Procedure. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(cc). Such a showing by no means requires the type of review a Court must conduct in a full review of the Rule 23 factors in relation to a motion to certify a class. See Pirelli, 229 F.R.D. at 412.

Of the four Rule 23 requirements—colloquially known as numerosity, commonality, typicality, and adequacy, see Fed. R. Civ. P. 23(a)—typicality and adequacy are the most relevant to the appointment of a lead plaintiff. See Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. LaBranche & Co., Inc., 229 F.R.D. 359, 412 (S.D.N.Y. 2004). “Typicality is satisfied if 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." In re Orion Secs. Litig., No. 08 Civ. 1328, 2008 WL 2811358, at *5 (S.D.N.Y. July 8, 2008) (quotations marks and citation omitted). Adequacy simply means that a proposed lead plaintiff has the ability to "fairly and adequately protect the interests of the class." Id. (quoting Fed. R. Civ. P. 23(a)). A movant need only make a "preliminary showing" as to those two prerequisites for appointment as lead plaintiff. Pirelli, 229 F.R.D. at 412.

The Court finds that Paige has made the required preliminary showing of typicality and adequacy required by Rule 23. The Court has taken only a quick look at the Rule 23 factors rather than conducted the in-depth analysis required by Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011). This statement therefore does not predetermine how the Court would resolve those factors on a formal Rule 23 motion. See Weinberg v. Atlas Air Worldwide Holdings, Inc., 216 F.R.D 248, 252 (S.D.N.Y. 2003) ("[A] wide ranging analysis under Rule 23 is not appropriate at this initial stage of the litigation and should be left for consideration of a motion for class certification.") (alterations and internal quotation marks omitted).

First, Paige's claims are typical of the putative class, because his claims arise from the same course of events as the other plaintiffs and will rely on the same legal theories. Paige purchased Magnum Hunter securities during the class period and, like other putative class members, suffered a loss in the form of diminution of the value of his securities. (Mem. of L. in Supp. of Mot. of Paige (Paige Mot.) 7, ECF No. 36.) Like the other Movants and members of the putative class, he alleges that

Magnum Hunter and its officers and directors made false and misleading statements upon which he relied. (Paige Reply 13.)

Paige will also adequately represent the class. His large financial stake makes him “extremely motivated to pursue the claims in this action,” and his proposed class counsel is a highly qualified firm with extensive expertise and experience in securities litigation. (Paige Reply 9; Paige Mot. 7; Bunch Decl. Ex. D (Cohen Milstein resume).) See In re Elan Corp. Secs. Litig., 08 Civ. 8761 (AKH), 2009 WL 1321167, at *2 (S.D.N.Y. May 11, 2009).

C. Appointment of Lead Counsel

The appointment of lead counsel is accorded to the “most adequate plaintiff,” conditioned upon court approval. 15 U.S.C. § 78u-4(a)(3)(B)(v). The Court begins from a “strong presumption in favor of approving a properly-selected lead plaintiff’s decision as to counsel selection and counsel retention.” In re Adelphia Commc’ns Corp. Secs. & Derivative Litig., 03 MDL 1529 (LMM), 2008 WL 4128702, at *2 (S.D.N.Y. Sept. 3, 2008).

The Court finds that Paige’s proposed counsel, Cohen Milstein Sellers & Toll PLLC, has substantial experience litigating on behalf of securities class action plaintiffs in these types of actions. (See Paige Mot. 7; Bunch Decl. Ex. D.) The Court will thus appoint the firm to serve as lead counsel in this action.

CONCLUSION

For the aforementioned reasons, it is hereby ORDERED that:

1. This action shall be renamed In re Magnum Hunter Resources Corporation Securities Litigation.
2. All related actions subsequently filed in, or transferred to, this District shall be consolidated into this action, absent order of the Court.
3. Movant Edward Paige's motion for appointment as lead plaintiff and for selection of lead counsel is GRANTED. Paige will serve as lead plaintiff in this action, with Cohen Milstein Sellers & Toll PLLC as lead counsel.
4. Ly, the Pappas Group, the Kelly Group, the D'Agosta Group, and the Macomb Group's motions for appointment as lead plaintiff and for selection of lead counsel are DENIED.
5. Counsel for Defendants shall enter notices of appearance in this action.
6. Lead Plaintiff Paige shall file an amended consolidated complaint not later than **Monday, October 21, 2013**.
7. Defendants shall answer or otherwise respond to the amended consolidated complaint not later than **Monday, November 18**.
8. If Defendants file a motion to dismiss the amended consolidated complaint, lead plaintiff shall file and serve its opposition to the motion not later than **Monday, December 16**, and Defendants shall file and serve any reply not later than **Monday, December 23**.
9. The parties shall appear for an initial pretrial conference ("IPTC") on **Thursday, January 16, 2014 at 1:00 p.m.**

10. At least **four business days prior** to the IPTC, the parties shall jointly submit a proposed schedule in accordance with the form available at <http://www.nysd.uscourts.gov/judge/Forrest>. Counsel shall comply with all other requirements for an IPTC described in the Court's Individual Practices in Civil Cases. See Rule 4.B.

11. Lead counsel shall promptly serve a copy of this Order on counsel for defendants.

The Clerk of Court is directed to terminate the motions at ECF Nos. 17, 21, 24, 35, 38, and 40.

SO ORDERED.

Dated: New York, New York
October 7, 2013



KATHERINE B. FORREST
United States District Judge