

December 2, 2009

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker
Clerk of Court

In re:

BARD ASSOCIATES, INC.,

Petitioner.

No. 09-6243
(D.C. No. 5:08-CV-936-M)
(W.D. Okla.)

ORDER

Before **BRISCOE, O'BRIEN**, and **TYMKOVICH**, Circuit Judges.

Bard Associates, Inc. requests a writ of mandamus vacating the district court's September 24, 2009, order denying Bard's motion to serve as lead plaintiff in a putative class action lawsuit against Quest Resource Corporation under the federal securities laws; the order appointed instead a group of three individual investors known as the Ord Group.¹ Because Bard has failed to show a clear and indisputable right to the writ, we deny the petition.

¹ In the same order, the district court denied Bard's request to be the lead plaintiff in a related suit against Quest Energy Partners, L.P. brought under the Securities Act of 1933, but Bard appears to have abandoned its efforts to lead that class of plaintiffs. Bard's mandamus petition requests only that the district court be directed to appoint it as "lead plaintiff for the Class of purchasers of Quest Resource Corporation . . . common stock." Pet. at 2; *see also id.* at 29.

I.

Bard, an investment advisory firm, lost approximately \$1.4 million in Quest stock on behalf of its clients during the class period. In November 2008, Bard filed a motion to serve as lead plaintiff under the Private Securities Litigation Reform Act of 1995 (PSLRA), 15 U.S.C. § 78u-4. The Ord Group filed a competing motion, claiming losses of approximately \$146,000. While the motions were pending, the Second Circuit decided *W.R. Huff Asset Management Co. v. Deloitte & Touche LLP*, 549 F.3d 100 (2nd Cir. 2008). *Huff* holds that an investment advisor lacks Article III standing to assert securities claims based on client losses absent assignments conferring “legal title to, or a proprietary interest in, the claim[s].” *Id.* at 108. Although *Huff* was not a class action and did not involve competing lead-plaintiff motions under the PSLRA, it set off a flurry of standing-based challenges to lead-plaintiff appointments in pending cases. *See, e.g., In re Herley Indus. Inc. Sec. Litig.*, No. 06-2596, 2009 WL 3169888, at *4 (E.D. Pa. Sept. 30, 2009) (collecting cases). The Ord Group immediately seized on *Huff* to challenge Bard’s standing because Bard did not have assignments of its clients’ claims.

In response, Bard secured valid assignments from all of its 152 clients, and in July 2009, obtained permission from the court to supplement its lead-plaintiff motion. Nonetheless, the district court denied Bard’s request to serve as lead plaintiff and appointed the Ord Group instead, concluding that the PSLRA’s strict

time limits precluded it from considering assignments made after the filing of Bard's lead plaintiff motion.²

The PSLRA is unequivocal and allows for no exceptions. All motions for lead plaintiff must be filed within sixty (60) days of the published notice for the first-filed action. . . . Supplementation after the expiration of the sixty (60) day period would not only be inconsistent with the language and purposes of the PSLRA, but would effectively nullify the time limits expressly provided therein.

Order (Pet. Ex. 1) at 9-10 (internal quotation marks and citation omitted).

The gist of Bard's mandamus petition is that the district court adopted an unduly strict interpretation of the PSLRA's 60-day deadline and disregarded the statute's clear preference for appointing institutional investors with large financial stakes as lead plaintiffs in securities litigation. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 321 (2007) (noting that the PSLRA's lead plaintiff provision is "aimed to increase the likelihood that institutional investors—parties more likely to balance the interests of the class with the long-term interests of the company—would serve as lead plaintiffs").

II.

"[A] writ of mandamus is a drastic remedy, and is to be invoked only in extraordinary circumstances." *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180,

² The PSLRA provides that "not later than 60 days after the date on which the notice [of the pendency of the lawsuit] 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)(II). It further provides that the court shall make the lead plaintiff appointment "[n]ot later than 90 days" after publication of the lawsuit to class members. *Id.* § 78u-4(a)(3)(B)(i).

1186 (10th Cir. 2009) (quotation marks and citation omitted). Accordingly, we will issue the writ “only when the district court has acted wholly without jurisdiction or so clearly abused its discretion as to constitute usurpation of power.” *Id.* (quotation marks omitted). The petitioner must show that he has “no other adequate means to attain [] relief” and “that his right to the writ is clear and indisputable.” *Id.* at 1187 (quotation marks omitted). In exercising our discretion, we must also “be satisfied that the writ is appropriate under the circumstances.” *Id.* (quotation marks omitted). We consider the petitioner’s request in light of the following factors:

- (1) whether the party has alternative means to secure relief;
- (2) whether the party will be damaged in a way not correctable on appeal;
- (3) whether the district court’s order constitutes an abuse of discretion;
- (4) whether the order represents an often repeated error and manifests a persistent disregard of federal rules; and
- (5) whether the order raises new and important problems or issues of law of the first impression.

Id. (quotation marks omitted).

Bard’s petition certainly raises novel issues concerning the breadth of a district court’s supervisory powers over class action litigation governed by the PSLRA. We also recognize that mandamus relief may be appropriate under certain circumstances to vacate appointments made in disregard of the Act’s lead plaintiff provisions. *See Cohen v. U.S. Dist. Court*, ___ F.3d ___, 2009 WL 3681701, at *1 (9th Cir. Nov. 5, 2009) (issuing writ to overrule district court’s appointment of lead counsel); *In re Cavanaugh*, 306 F.3d 726, 728-29 (9th Cir.

2002) (issuing writ where district court departed from sequential analysis mandated by PSLRA). Bard has failed to convince us, however, that the district court's appointment of the Ord Group as lead plaintiff in this case either ignored the mandates of the PSLRA or otherwise constituted a gross abuse of discretion justifying issuance of the writ.

The PSLRA instructs district courts to appoint as lead plaintiff the class member that it “determines to be *most capable* of adequately representing the interests of class members.” 15 U.S.C. § 78u-4(a)(3)(B)(i) (emphasis added). “The ‘most capable’ plaintiff—and hence the lead plaintiff—is the one who has the greatest financial stake in the outcome of the case, so long as he meets the requirements of Rule 23.” *In re Cavanaugh*, 306 F.3d at 729 (footnote omitted). Bard has indisputably demonstrated that it holds the largest financial stake in the outcome of this litigation. The district court concluded, however, that Bard demonstrated its financial interest too late because it did not produce assignments of its clients' claims until after the 60-day deadline set forth in 15 U.S.C. § 78u-4(a)(3)(A)(i)(II). This conclusion was not an abuse of discretion. *Huff* has prompted several lower courts to recognize the standing problems facing investment advisors seeking to serve as lead plaintiffs under the PSLRA. *See, e.g., Northstar Fin. Advisors, Inc. v. Schwab Invs.*, 609 F. Supp. 2d 938, 942 (N.D. Cal. 2009); *In re IMAX Sec. Litig.*, No. 06 Civ 6128 (NRB), 2009 WL 1905033, at *2-3 (S.D.N.Y. June 29, 2009); *In re Herley*, 2009 WL 3169888, at

*5. Moreover, the concept announced in *Huff* is not new. In 1993, the Seventh Circuit held in a Commodities Exchange Act case that an investment advisor lacked standing to sue for losses incurred by its customers because it failed to satisfy the injury-in-fact element of standing. *Indemnified Cap. Invs., SA v. R.J. O'Brien & Assocs., Inc.*, 12 F.3d 1406, 1409 (7th Cir. 1993). These cases undermine Bard's claim that it could not have anticipated a standing-based challenge to its lead plaintiff motion. We also note that Bard has not argued that it was somehow precluded from obtaining its clients' assignments before the 60-day filing deadline.

In perhaps its strongest argument, Bard accuses the district court of implicitly rejecting established precedent holding that Article III standing is determined as of the time the complaint is filed. *See, e.g., Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1154 (10th Cir. 2005) ("Standing is determined as of the time the action is brought."). Bard argues that the effect of the court's order in this case was to require it to demonstrate standing prematurely in advance of its complaint. But the cases it relies on did not arise in this context, where an essentially absent class member has sought lead plaintiff status under the PSLRA. Accepting Bard's argument would put district courts in the precarious position of having to select a lead plaintiff without knowing whether that plaintiff even has standing to sue. One can easily imagine the inefficiencies that would result if the successful movant is ultimately unable to secure assignments of the claims it

seeks to assert. The district court avoided this potential pitfall by adopting a bright line rule requiring lead plaintiff movants to establish Article III standing by the time the lead plaintiff motions are due, that is, “not later than 60 days after the date on which [] notice is published,” 15 U.S.C. § 78u-4(a)(3)(A)(i)(II). We are not prepared to say that in adopting this bright line rule, the district court “acted wholly without jurisdiction or so clearly abused its discretion as to constitute usurpation of power.” *In re Cooper Tire*, 568 F.3d at 1186 (quotation marks omitted).

III.

Bard’s petition for a writ of mandamus is DENIED.

Entered for the Court,

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker". The signature is written in black ink and includes a long, sweeping horizontal flourish at the end.

ELISABETH A. SHUMAKER, Clerk