

THE GENERAL SERVICES ADMINISTRATION
CIVILIAN BOARD OF CONTRACT APPEALS

ARCTIC SLOPE NATIVE ASSOCIATION,
LTD.

Appellant,

v.

INDIAN HEALTH SERVICE; UNITED
STATES DEPARTMENT OF HEALTH
AND HUMAN SERVICES

Respondents.

CBCA 190-ISDA and CBCA 289-ISDA
through 293-ISDA

**RESPONSE IN OPPOSITION TO MEMORANDUM OF ARCTIC SLOPE
NATIVE ASSOCIATION IN SUPPORT OF MOTION FOR PARTIAL
SUMMARY JUDGMENT ON THE ISSUE OF EQUITABLE TOLLING**

Appellant, Arctic Slope Native Association, Ltd. (“ASNA”), filed its motion in response to a remand order from the United States Court of Appeals for the Federal Circuit to the Civilian Board of Contract Appeals (“CBCA” or “Board”). *See Arctic Slope Native Association, Ltd. v. Sebelius*, 583 F.3d 785, 798 (Fed. Cir. 2009). The sole matter remanded to the CBCA is whether it has jurisdiction to hear an appeal of contract claims not submitted to the Indian Health Service (“IHS”) within the six-year period mandated by the Contract Disputes Act (“CDA”), 41 U.S.C. § 605(a).¹ The presentment requirements are a prerequisite to the CBCA’s review of a contracting officer’s decision. *See James M. Ellett Constr. Co. v. United States*, 93 F.3d 1537, 1542 (Fed.

¹ The CBCA’s jurisdiction over these appeals is the threshold issue. Accordingly, if ASNA fails to meet its burden of proving equitable tolling and its motion is denied accordingly, dismissal of the affected claims is proper.

Cir. 1996) (“Congress granted the court jurisdiction only over an appeal from a contracting officer’s decision on a valid claim.”).

ASNA does not deny that it failed to present timely claims to the contracting officer and, therefore, did not comply with the CDA’s prerequisites. ASNA thus admits that it submitted the claims at issue more than six years after they accrued. Instead ASNA argues that its claims are saved by the application of equitable tolling. The basic premise of the argument appears to be that ASNA did not present timely because it believed the class action filed in *Pueblo of Zuni v. United States*, No. CV 01-1046 (D.N.M.) (“*Zuni*”), satisfied its individual claim presentment requirement. In other words, ASNA argues that, by relying on *Zuni*, it never needed to present individual claims to the contracting officer. It is unclear how its argument that presentment was not required can support its argument that presentment should be tolled. Moreover, ASNA’s asserted reliance on flawed legal interpretations of no less than three class actions to support its argument and justify its failure to comply with a simple statutory requirement is confusing.

Specifically, ASNA’s reliance on *Zuni* is based on flawed legal assumptions already rejected by the Federal Circuit. Rather than exercising due diligence, ASNA’s failure to submit timely claims reflects careless indifference to the statutory scheme Congress established to resolve contract claims. ASNA’s attempt to lay the blame at IHS’s feet by alleging a change in agency position fails to justify its inaction. ASNA was, at best, irresponsible if it believed that it was exempt from the law and not required to submit its contract claims to the agency. Accordingly, ASNA’s motion for partial summary judgment should be denied.

STATEMENT OF THE CASE

ASNA submitted CDA claims for additional contract support costs (“CSC”) to IHS on September 30, 2005. ASNA claimed that, under 25 U.S.C. § 450j-1(a)(2), (g), IHS had a contractual and statutory duty to fully fund its need for CSC and that the failure to do so breached the parties’ Indian Self-Determination and Education Assistance Act contracts and annual funding agreements. The contract claims spanned fiscal years (“FYs”) 1996–2000.

When ASNA appealed its claims to the CBCA, IHS moved to dismiss the FYs 1996–1998 claims as untimely. The Board agreed with IHS and held that it had no jurisdiction to consider the FYs 1996–1998 claims because ASNA failed to present them to the IHS contracting officer within the six years permitted by the CDA. *Arctic Slope Native Assoc., Ltd. v. Sebelius*, 08-2 BCA P 33923. In doing so, the Board rejected ASNA’s contention that the CDA’s presentment deadline was tolled by either class action tolling or equitable tolling. Accordingly, the Board dismissed the FYs 1996–1998 claims as time-barred.

ASNA, along with two other tribes, appealed the ruling to the Federal Circuit, arguing that the Board erred in concluding that neither class action nor equitable tolling applied to the claims at issue. On September 28, 2009, the Federal Circuit agreed with the Board and the Department that the class action tolling doctrine did not apply to the CDA’s presentment deadline. *See Arctic Slope Native Assoc. v. Sebelius*, 583 F.3d 785 (Fed. Cir. 2009). However, the Federal Circuit found that the CDA’s presentment deadline may be subject to equitable tolling and remanded the cases to the Board to determine whether ASNA could prove the factors

necessary to extend equitable tolling to its claims.²

STATEMENT OF FACTS

ASNA's Statement of Facts focuses primarily on the procedural history of three putative class action cases filed against two different Federal agencies. ASNA's Stmt. ¶¶ 5-22. *Ramah Navajo Ch. v. Lujan*, No. 90-0957 (D.N.M.) ("*Ramah*"), was the only one of the three cases to be certified as a class and was brought against the Department of the Interior. ASNA's statements about the cases largely appear to be legal arguments rather than facts. Nonetheless, ASNA statements include omissions of several pertinent aspects of each case and mischaracterizations of others.

Ramah

ASNA's characterization of Judge Hansen's decision to excuse presentment for unnamed class members in *Ramah* is, at best, incomplete. The memorandum opinion is an unpublished decision involving a different agency that did not appeal and a prior version of the CDA that mandated presentment but did not have a statutory presentment deadline. *Ramah*, Order of Oct. 1, 1993 at 1 (Dkt. No. 96) (Simon Decl. Exh. A). Contrary to ASNA's assertions, Judge Hansen did not find that "the CDA presentment requirement was satisfied through the timely presentment of one representative claim by just the class representative, the Ramah Navajo Chapter." ASNA Br. at 5. Rather than finding that the presentment requirements were "satisfied" by the class

² If ASNA meets the burden of proving the applicability of equitable tolling, it will have the opportunity to prove the merits of its claims. However, IHS would move for summary relief on ASNA's FY 1998 contract claim based on the CBCA's earlier finding in *Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians v. Dep't of Health & Human Serv.*, 09-2 BCA P 34278 (C.B.C.A. Oct. 01, 2009), that no funds are legally available to pay CSC claims for FY 1998 contracts.

representative, as ASNA now suggests, Judge Hansen held that exhaustion could be excused when “[a]dministrative remedies are generally inadequate or futile” due to “structural or systemic failure.” Order at 4 (Exh. A at 5) (quoting *Assoc. for Cmty. Living in Colo. v. Romer*, 992 F.2d 1040, 1044 (10th Cir. 1993)). Judge Hansen further held that presentment was not required in *Ramah* because the “[p]laintiff’s action challenge[d] the policies and practices adopted by the BIA as being contrary to the law and [sought] to make systemwide reforms.” *Ramah* Order at 4(Exh.A at 5).

In its consideration of ASNA’s claims, the Federal Circuit refuted ASNA’s reliance on *Ramah*, noting that:

[T]he court in that case did not adopt the general principle that asserted class members need not exhaust their administrative remedies in an ISDA contract case. Instead, the court held that exhaustion of administrative remedies was not required under the circumstances of that case because it would have been futile. The appellants have not argued that any “futility” exception excuses their failure to make timely presentments of the disputed claims to the contracting officers.

Arctic Slope at 796 n.3.³

Cherokee

In 1999, the Cherokee Nation of Oklahoma and the Shoshone-Paiute Tribes of the Duck Valley Reservation moved for certification of a class of “[a]ll Indian tribes and tribal

³ Despite the Federal Circuit’s ruling, ASNA continues to rely on *Ramah* for the premise that it was not required to present individual claims. ASNA appears to be conflating the ruling of the case (futility) with the concept of the single-filing rule. The “single-filing rule,” not the futility doctrine, permits a class representative to satisfy administrative requirements on behalf of unnamed class members. *See e.g., Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1056 (2nd Cir. 1990) (holding that, under the Age Discrimination in Employment Act, “courts have regularly held that the timely filing of an administrative charge by a named plaintiff in a class action satisfies the charge filing obligation of all members of the class.”). The *Ramah* court did not apply this single-filing rule to the CDA.

organizations operating Indian Health Service programs . . . that were not fully paid their contract support cost needs, as determined by IHS, at any time between 1988 and the present.” *Cherokee Nation of Okla. v. U.S.*, 199 F.R.D. 357, 362 (E.D. Ok. 2001) (“Cherokee”). As proposed, the broad description of the class would have included contractors that, like ASNA, had yet to present any claims to the agency. But the court denied class certification on February 1, 2001, finding the requirements of typicality, commonality, and adequate representation had not been met. *Id.* at 366.

The distinctions between *Ramah* and *Cherokee* are clear. For example, the *Ramah* issue of whether presentment was futile, and thus excused, was never answered by the court in *Cherokee* or briefed by the parties. In addition, the *Cherokee* court found a systemwide approach unworkable:

Each tribes’ contract is individual and specific to it. It was negotiated separately from the other tribes and consequently its provisions could possibly have a different meaning for “full” contract support costs. A tribes’ entitlement to “full” contract support costs as it applies to each tribe is the question at the heart of this lawsuit. It appears there could be a variety of different legal and remedial theories for each tribe, dependent on its contractual terms. *Thus, the court finds it difficult to conclude the plaintiffs’ claims and the proposed class claims are based on the same legal or remedial theory.*

Cherokee, 199 F.R.D. at 364 (emphasis added).

ASNA’s reliance on *Cherokee* also takes aim at a footnote in the government’s brief opposing class certification on numerosity (among other) grounds.⁴ Government’s Opposition to

⁴ The footnote, in its entirety, is reproduced here for the sake of expediency:

Ramah Navajo Sch. Bd., Inc. v. Babbitt, 87 F.3d 1338 (D.C. Cir. 1996) (challenging Department of Interior disbursal plan for fiscal year 1995 contract support costs); *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997) (seeking additional indirect contract support costs from Department of Interior for

Plaintiff's Motion for Class Certification, filed in *Cherokee Nation of Oklahoma, et al. v. United States*, No. CIV-99-092-S (E.D. Okla.) (April 19, 2000) at 12-13 (Simon Decl. Exh. B). ASNA apparently construes the last sentence of the footnote as setting forth the "government's argument at the time . . . that a tribal contractor who had administratively presented a claim for unpaid CSCs could not participate as a class member in class litigation seeking damages for such claims." ASNA Br. at 9. But nowhere in the footnote does the government assert that contractors who presented would be barred from participating in the putative *Cherokee* class. Rather, the footnote was set forth as part of the government's numerosity argument that the proposed class was too broad because it would interfere with litigation already pending or finally adjudicated by individual tribes elsewhere. *See* Exh.B at 18-19. In fact, the government's brief only specifically asserted that tribes with "judicial decisions on their claims cannot be included in the class because their claims would be barred by principles of res judicata." *Id.* at 19.

fiscal year 1989); *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Shalala*, 988 F. Supp. 1306 (D. Or. 1999) (seeking additional contract support costs from IHS for 1996) (appeal pending); *California Rural Indian Health Bd., Inc. v. Shalala*, No. C-96-3526 DLJ (N.D. Cal. filed Sept. 27, 1996) (seeking additional contract support costs from IHS for fiscal years 1996 and 1997); *Norton Sound Health Corp. v. Shalala*, No. A00-080 CV (D. Ark. filed March 23, 2000) (seeking additional contract support costs for fiscal year 1999 and alleging IHS' failure to pay in accordance with the queue system); *Appeals of Cherokee Nation of Okla. v. United States Dep't of Health and Human Servs. (Indian Health Serv.)*, IBCA Nos. 3877-3879/98 (challenging IHS' denial of additional contract support costs for fiscal years 1994-96); *Appeals of Seldovia Village Tribe v. Indian Health Serv.*, IBCA Nos. 3782,3862-63/97 (challenging IHS' denial of additional contract support costs for fiscal years 1996-97); *Ninilchik Traditional Council v. Director, Alaska Area Native Health Servs., Indian Health Serv.*, Docket No. IBIA 99-72-A (appealing IHS' declination of contract support costs for fiscal year 1999). In addition, IHS has received claims under the Contract Disputes Act for additional contract support costs from the Metlakatla Indian Community, Southcentral Foundation, and Shoalwater Bay Indian Tribe, and claims from the Cherokee Nation of Oklahoma for fiscal years 1998-2000.

Zuni

Despite substantial reliance on the proceedings in *Ramah* and *Cherokee* for its equitable tolling argument here, ASNA relied on a third class action, *Zuni*, and no other, for the class action tolling argument rejected by the Board and the Federal Circuit. The *Zuni* class action was filed in Federal district court in New Mexico a few months after the *Cherokee* class was denied. The *Zuni* case was stayed for several years, and the class action ultimately was denied in 2007.

Prior to the decision denying class certification, the government moved to dismiss certain claims made by Zuni that had not been presented to the agency. One of Zuni's responses was to assert the futility argument raised in *Ramah*. In rejecting futility as an excuse for non-exhaustion by the named plaintiff, the *Zuni* court questioned whether exhaustion schemes permit exceptions for futility:

The plain statutory language of the CDA and case law interpreting the provision does not appear to provide the same flexibility. Besides, under Plaintiff's view of the nature of its claims, exhaustion would be unnecessary for virtually any and all ISDA contract dispute claims brought by Tribes. This does not make sense, given the strictness of the statutory scheme.

Pueblo of Zuni v. United States, 467 F. Supp.2d 1099, 1113 (D.N.M. 2006). Ultimately, the *Zuni* court agreed with the government and dismissed Zuni's unrepresented claims. The *Zuni* court later issued the same ruling as to putative class members. *Pueblo of Zuni v. United States*, 243 F.R.D. 436, 442–43 (D.N.M. 2007) (“[T]here is no legal basis for a waiver of this requirement for Plaintiff or any putative class member, given the express mandate for presentment with the statutory language.”).

STANDARD OF REVIEW

Summary relief is appropriate only where, “based upon uncontested material facts, [the

moving party] is entitled to relief . . . as a matter of law.” CBCA Rule 8(g)(1). The moving party must demonstrate the absence of any genuine issue of material fact. *Pate v. Dep’t of Agric.*, 2008-2 B.C.A. (CCH) ¶ 33,973, 2008 CIVBCA LEXIS 236, at *8 (Sept. 26, 2008) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)). In considering a motion for summary judgment, “the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence.” *Worth v. Jackson*, 377 F. Supp. 2d 177, 181 (D.D.C. 2005), *vacated in part on other grounds*, 451 F.3d 854 (D.C. Cir. 2006).⁵ See also *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 135, 150 (2000); *Bayer v. United States Dep’t of Treasury*, 956 F.2d 330, 333 (D.C. Cir. 1992).

ARGUMENT

I. AMERICAN PIPE TOLLING IS UNAVAILABLE TO ASNA, REGARDLESS OF HOW IT IS CHARACTERIZED

The Federal Circuit held that equitable tolling is available to toll the presentment deadline set forth in section 605(a) of the CDA. The remaining issue is whether ASNA can meet its burden of establishing the two elements necessary to apply equitable tolling to its particular contract claims. ASNA seeks to meet that burden through its characterization of the legal proceedings in *Ramah*, *Cherokee*, and *Zuni*, claiming that those proceedings justify its decision not to pursue its claims for several years. On its face, this reliance is nothing more than an end

⁵ Moreover, summary relief is not be appropriate without “adequate time for discovery.” See, e.g., *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson*, 477 U.S. n.5 (“[S]ummary judgment must be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition.”). Where, as here, no discovery has been conducted and the movant relies entirely on an affidavit, the non-moving party has not had the opportunity to conduct discovery (such as interrogatories and depositions) that would be essential to its opposition.

run around the Federal Circuit’s decision that class tolling does not apply to the CDA’s presentment deadline, and as such, the argument should be rejected by the CBCA.

As determined by the Federal Circuit, ASNA cannot rely on class action tolling because ASNA failed to present its claims in accordance with the law. *Arctic Slope*, 583 F.3d at 796-797. ASNA is now characterizing class tolling as equitable tolling to claim that its presentment deadline should be equitably tolled because the *Zuni* plaintiff filed a defective pleading. In a seminal case on equitable tolling, the Supreme Court cited a case involving a class action as an example of a defective pleading that “tolled the limitations period as to the individual claims of purported class members.” *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96 (1990) (referring to *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974)).

ASNA relies on *Irwin* to argue that “the Supreme Court will treat the filing of a ‘defective class action’ as a ‘defective pleading’ that gives rise to equitable tolling of the statute of limitations for the ‘individual claims’ that are subsequently pursued by ‘purported class members.’” ASNA Br. at 15. But *Irwin* did not enunciate some new tolling rule governing defective class actions. Rather, *Irwin* accurately restated that the *American Pipe* rule applies regardless of whether a class is certified or is denied, for example, because of a defective pleading. However, the tolling rule of *American Pipe* applies only to “asserted members of the class who would have been parties had the suit been permitted to continue as a class action.” *American Pipe*, 414 U.S. at 554–55.⁶ ASNA would not have been permitted to participate in the

⁶ Indeed, ASNA’s arguments are at odds with the Federal Circuit’s decision on these claims. The Federal Circuit held that “class action tolling does not apply because the party that failed to comply with the statutory requirement to present its claims to a contracting officer would not have satisfied the requirement, set forth in *American Pipe*, making class action tolling available ‘to all asserted members of the class who would have been parties had the suit been

class had it been certified because ASNA had not presented its claims to IHS. *Arctic Slope*, 583 F.3d at 796. So, regardless of whether ASNA tries to characterize *American Pipe* as an equitable tolling principle, the rule does not apply and is unavailable to toll ASNA’s unpresented claims. Nothing in the *Irwin* Court’s characterization of *American Pipe* changes the Federal Circuit’s ruling.

Nor is *Hatfield v. Halifax PLC*, 564 F.3d 1177 (9th Cir. 2009) helpful to ASNA’s claims. ASNA cites *Hatfield* to distinguish between “equitable” and “class action” tolling in the context of a class action. ASNA Br. at 16-18. However, *Hatfield* involved a cross-jurisdictional tolling issue in which *American Pipe* tolling was inapplicable. *Hatfield*, 564 F.3d at 1187 (relying on *Clemens v. Daimler Chrysler Corp.*, 534 F.3d 1017, 1025 (9th Cir. 2008) (“The rule of *American Pipe* — which allows tolling within the federal court system in federal question class actions — does not mandate cross-jurisdictional tolling as a matter of state procedure.”)). The Ninth Circuit relied on tolling under California law, and not the Federal tolling doctrine set forth by the Supreme Court in *Irwin* or *American Pipe*, to toll the claims of the named plaintiff and asserted members of the earlier class, who were California residents. In doing so, the court noted that it relied on California law only because the parties failed to brief the applicable English tolling law. *See Hatfield*, 534 F.3d at 1184 (“Because we hold that *Hatfield*’s claims are governed by the English statute of limitations, the tolling law to be applied would be that of English law.”). This case involves no cross-jurisdictional tolling issue. Accordingly, *American Pipe* governs, and as the Federal Circuit held, the rule does not save ASNA because it failed to take the action

permitted to continue as a class action.” *Arctic Slope*, 583 F.3d at 796.

necessary to rely on the class action.

II. ASNA GAMBLED WITH ITS RIGHTS RATHER THAN DILIGENTLY PURSUING THEM

“Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.” *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (U.S. 2005) (citing *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96 (1990)); *see also Holland v. Florida*, --- U.S. ---, 130 S. Ct. 2549, 2562 (2010) (citing *Pace* in its ruling that “‘petitioner’ is ‘entitled to equitable tolling’ only if he shows ‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way’ and prevented timely filing.”).⁷ Moreover, “it is clearly established that ‘although absence of prejudice is a factor to be considered in determining whether the doctrine of equitable tolling should apply once a factor that might justify such tolling is identified, it is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures.’” *Tinker AFB v. FLRA*, 321 F.3d 1242, 1246 (10th Cir. 2002) (citing *Baldwin City Welcome Ctr. v. Brown*, 466 U.S. 147, 152 (1984)). Thus, the absence of prejudice is not a basis for permitting equitable tolling, but the presence of prejudice would bar the application of equitable tolling.

⁷ In addition, a movant could seek equitable tolling by proving that it was “induced or tricked by his adversary’s misconduct” into missing filing deadlines. *See Irwin*, 498 U.S. at 96; *see also Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1238–39 (Fed. Cir. 2002); *Bonneville Assocs., Ltd. P’ship v. Barram*, 165 F.3d 1360, 1365 (Fed. Cir. 1999); *Wood-Ivey Sys. Corp. v. United States*, 4 F.3d 961, 964 n.4 (Fed. Cir. 1993); *Bath Iron Works Corp. v. United States*, 20 F.3d 1567, 1572 n.2 (Fed. Cir. 1994). ASNA has not alleged such misconduct, and indeed, acknowledges that no affirmative misconduct occurred. ASNA Br. at 22. Because ASNA has not alleged misconduct, we also will not brief this aspect of equitable tolling.

ASNA's actions lack any semblance of diligence. ASNA continues to conflate its mistaken view of futility with its mistaken view of tolling to argue that this Board should excuse its failure to present claims to the agency in a timely manner. ASNA also continues to misconstrue when a party may rely on a defective pleading to toll a statute of limitations. Likewise, ASNA continues to misconstrue three separate class actions in its effort to seek equitable tolling of its claims.

ASNA argues that it reasonably relied on the *Zuni* class filing to protect its claims. Though it relies on that *filing*, ASNA really relies on the futility determination in a separate case (*Ramah*) as justification for foregoing exhaustion of its own claims. As the *Zuni* court held, ASNA's decision was unsupported by the law: "Plaintiff can hardly be said to rely on the oblique argument that a class certification order in a separate case allows Plaintiff to forego exhaustion of their claims in this case." *See Pueblo of Zuni*, 467 F.Supp.2d at 1114. Although the court was directing this statement at the named plaintiff in *Zuni*, the legal conclusion applies equally to ASNA here. ASNA's asserted reliance on *Zuni*, based on a clearly incorrect legal interpretation of Judge Hansen's order in *Ramah*, and an incorrect understanding of *American Pipe* tolling, was a bold and risky gamble. They rolled the dice and lost: *Zuni* does not protect ASNA's claims because ASNA never took any action, not even to maintain its status as a purported member of the *Zuni* class. In other words, it was not the defective pleading in *Zuni* that failed ASNA. Rather, ASNA's failure to present its claims to the agency as required by the CDA now serves as the barrier to those claims being heard by the CBCA.⁸

⁸ This case does not address the issue of whether the defective pleading in *Zuni* might toll the twelve-month deadline for appealing from the contracting officer to Federal court. *See* 41 U.S.C. § 609(a)(3).

Still, ASNA claims that it expected not to have to present in *Zuni* because it did not have to present in *Ramah*. Again, that presumption was based on a clear misinterpretation of the ruling in *Ramah*. Presentment was not excused in *Ramah* based solely on the filing of the class. Instead, futility was the basis under which the court excused presentment for the *Ramah* class. The futility analysis undertaken in *Ramah* is, by nature, a case-by-case determination, as explained by the case relied upon by Judge Hansen in his decision. *See Assoc. for Cmty. Living in Colo. v. Romer*, 992 F.2d 1040 (10th Cir. 1993) (“Even where exhaustion is necessary, the exhaustion of a few representative claims *may* be sufficient to secure statutory compliance and, if not, would at least serve the purposes of the exhaustion requirement and properly frame the issues for judicial review.” (emphasis added)). Indeed, in *Assoc. for Cmty. Living*, the Tenth Circuit refused to apply the futility doctrine to excuse exhaustion. Moreover, since Judge Hansen’s decision to excuse presentment in *Ramah*, the Supreme Court has admonished courts to “not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise.” *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001) (because Congress mandated exhaustion under the Prison Litigation Reform Act of 1995, exhaustion could not be excused). For these reasons, it is unreasonable for ASNA to claim reliance on an unpublished, non-binding decision involving a different Federal agency and a prior version of the CDA presentment requirement to excuse its inaction and seek equitable tolling.

ASNA also relies on the *Cherokee* class action in its efforts to excuse its inaction. ASNA asserts that the government took the position that presentment was a bar to participation in the *Cherokee* class action. But such an assertion would be nonsensical to the government’s position. The government was arguing that no class should be certified at all. And the government did not

present an exhaustion argument in *Cherokee* as it did in *Ramah*, to oppose class certification. And unlike *Ramah*, futility was never considered for putative class members to forgo presentment.⁹ The statement relied upon by ASNA was made in the context of the government's Rule 23 argument on the lack of numerosity required to support a class action. The cases listed in the footnote, and additionally, the individual claims submitted to the agency, established that the plaintiffs in *Cherokee* were remiss in representing to the court that all tribal contractors were members of the class. The tribes already in litigation in Federal court or before the Interior Boards of Contract Appeals and the Interior Board of Indian Appeals were clearly pursuing their claims individually, and those that were in the pipeline (e.g., before the contracting officer) were free to do the same if their claim was denied by contracting officer. By failing to explain the multi-stage CDA process and representing that all tribal contractors were in the same position, the plaintiffs in *Cherokee* were ignoring differences that the government believed highly relevant to the numerosity element of the class action. Moreover, this concern was articulated in the context of *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979), in which the Supreme Court instructed that the "certification of such a class would not improperly interfere with the litigation of similar issues in other judicial districts." The asserted *Cherokee* class was so broad, it would have undoubtedly interfered with simultaneous actions by individuals tribes. In other words, it was the plaintiff who erred by failing to exclude a significant number of contractors that had chosen or could choose to pursue their rights individually, and whose rights would be interfered by the class action. The brief made no assertions about tribes that had yet to submit claims,

⁹ Because futility was never argued in *Cherokee*, whether the government would have opposed a finding of futility by the court is speculative, to say the least.

including whether such claimants should be required to present claims to the agency (as the law requires) before joining the class. That is how the footnote should be understood.

ASNA's characterization of the government's brief in *Cherokee* would make the argument contrary to the government's arguments in *Ramah* that focused on administrative exhaustion, the *Ramah* decision on class certification, the CDA's election doctrine, and also the government's other arguments against class certification in *Cherokee*. For example, though Judge Hansen found that presentment was excused in *Ramah* based on futility, this was clearly an exception to the requirement that presentment of a claim is a "jurisdictional prerequisite to the filing of a complaint relative to the claim in the Court of Claims." *Ramah* Order at 3 (Exh. A at 4). Thus, had Judge Hansen not found futility as a basis for excusing the "jurisdictional requirement" in *Ramah*, it is fair to conclude that all tribes would have had to present claims to participate in the *Ramah* class. Accordingly, it would have made no sense for IHS to posit in *Cherokee* that a tribe is excluded from a class by complying with the CDA requirement of submitting a contract claim to the contracting officer. Even the *Cherokee* court pointed out that the government focused on Rule 23 in opposing class certification and not administrative exhaustion like it did in *Ramah*. See *Cherokee*, 199 F.R.D. at 365 n. 1. Also, ASNA's characterization of the government's argument would not appear to be consistent with the CDA's election doctrine, which holds that a contractor continues to have a choice of forums (administrative or judicial) to appeal an adverse contracting officer decision, and is not bound to a particular forum until it has filed an appeal of that decision. See e.g., *National Neighbors, Inc. v. U.S.*, 839 F.2d 1539, 1542 (Fed. Cir. 1988).

Even if the government's footnote could somehow be construed by ASNA to suggest a

departure from the government's argument in *Ramah*, ASNA's reliance would still fail. As demonstrated by *Ramah*, it is the court, and not the agency, that would excuse presentment on futility grounds.¹⁰ Moreover, to rely on a "misrepresentation" for equitable tolling, it must be a misrepresentation of fact, not of law. *Johnson v. Berry*, 228 F. Supp.2d 1071, 1076 (E.D. Mo. 2002). Even so, proposing alternative legal theories in the same case, much less separate cases, is not misrepresentation. But for purposes of extending equitable tolling,, "relying on the legal opinion of another's attorney is unreasonable when both parties are aware adverse interests are being pursued." *Kregos v. Associated Press*, 3 F.3d 656, 661 (2nd Cir. 1993).

Contractors that present their claims during the pendency of a class action need not seek out government endorsement or hope that a judge will excuse presentment. Rather, if the claims are denied, contractors that present can immediately join the class, if certified, or proceed with their own individual actions. ASNA could have easily done this while waiting for a decision on class certification, which would have been the diligent and active approach to preserving its rights. *See Arctic Slope*, 583 F.3d at 796 ("As the claim letters in the record in this case show, however, such submissions to the contracting officer need not be elaborate. Moreover, where, as here, the various parties' claims all depend on a single legal theory — which will normally be the case when those claims are amenable to class action treatment — little separate effort will have to be devoted to each claim apart from identifying the amount of the claim."). Instead, ASNA sat

¹⁰ Even so, the characterization of IHS's footnote in ASNA's Statement of Facts is not a fact. Rather it is ASNA's legal characterization of what the footnote means. Challenging ASNA's understanding, based on Eben Hopson's Affidavit, would require deposing Eben Hopson to determine, for instance, who in IHS made some of the representations alleged in his affidavit. We believe that to be unnecessary because what appears to be a misunderstood statement in a brief filed by the government is not a basis to apply equitable tolling.

idly for years without taking any action to protect its rights.

The second prong of the Supreme Court's test in *Pace* is that some extraordinary circumstance stood in the way. *See Pace v. DiGuglielmo*, 544 U.S. at 418. ASNA has not pled any extraordinary circumstance and none exist here to warrant equitable tolling. *See, e.g.; Holland v. Florida*, 130 S.Ct. at 2564 (attorney abandonment constitutes an extraordinary circumstance); *Stoll v. Runyon*, 165 F.3d 1238, 1242 (9th Cir. 1999) (mental incapacity can be an extraordinary circumstance).

As for ASNA's assertion that IHS can show no prejudice, prejudice cannot be invoked as a basis for equitable tolling. Rather, "absence of prejudice is a factor to be considered in determining whether the doctrine of equitable tolling should apply once a factor that might justify such tolling is identified." *Baldwin City Welcome Ctr.*, 466 U.S. at 152. The absence of prejudice "is not an independent basis for invoking the doctrine and sanctioning deviations from established procedures." *Id.* In other words, the absence of prejudice does not justify equitable tolling, but the presence of it would bar equitable tolling.

III. ASNA GAMBLED BY RELYING ON A SUBSEQUENT CLASS ACTION AS ITS BASIS FOR TOLLING

ASNA also gambled by relying on *Zuni* because it was the second class action filed against IHS. Numerous courts have held that litigants may not benefit from tolling by stacking subsequent class actions. *See, e.g., Yang v. Odom*, 92 F.3d 97, 104 (3d Cir. 2004); *Basch v. Ground Round, Inc.*, 139 F.3d 6, 11 (1st Cir. 1998); *Andrews v. Orr*, 851 F.2d 146, 149 (6th Cir. 1988); *Korwek v. Hunt*, 827 F.2d 874, 879 (2d Cir. 1987); *Salazar-Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1351 (5th Cir. 1985). At least one court appears to have rejected the idea that a litigant can rely on a subsequent class action at all, regardless of whether they are

truly being “stacked.” See *In re Vioxx Products Liability Litigation*, 478 F. Supp.2d 897, 907 (E.D. La. 2007). These cases are consistent with *American Pipe*, in which the Supreme Court held that putative members of the class need not even be aware of the class to benefit from tolling. See *American Pipe*, 414 U.S. at 552 (“It follows that even as to asserted class members who were unaware of the proceedings brought in their interest or who demonstrably did not rely on the institution of those proceedings, the later running of the applicable statute of limitations does not bar participation in the class action and in its ultimate judgment.”) Read fairly, these cases would always bar reliance on subsequent class actions, in which case ASNA could only have relied on *Cherokee*. Indeed, ASNA has failed to cite any case in which a litigant benefitted from *American Pipe* tolling in a subsequently filed class action. If ASNA had relied on *Cherokee* instead of *Zuni*, it would have had years after the *Cherokee* court denied the class to present some of its claims. But in reality, ASNA is in some way relying on all three class actions — *Ramah*, *Cherokee*, and *Zuni* — even though IHS was not even a party to one of the three cases. This reliance may not be the traditional sort of class action stacking that courts have consistently rejected, but it should certainly not be viewed as a diligent preservation of rights.

CONCLUSION

Because ASNA’s motion is nothing more than an attempt to circumvent the Federal Circuit’s denial of the application of class action tolling to ASNA’s claims, and because ASNA has put forth nothing to prove its burden as to equitable tolling, the motion should be denied.

Respectfully submitted this 5th day of November 2010.

For Respondent:

S/ Sean Dooley

By: _____

Sean Dooley

Senior Attorney

Public Health Division

Office of the General Counsel

Room 4A-37 Parklawn Building

5600 Fishers Lane

Rockville, Maryland 20857

(Licensed in Maryland BAR#: NA)