

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

PUEBLO OF ZUNI, on behalf of itself
and all others similarly situated,

Plaintiff,

Case No. CV 01-1046 WJ/WPL

v.

UNITED STATES OF AMERICA; et al.,

Defendants.

**RESPONSE TO APPLICATION UNDER RULE 23(g) FOR
CREATION OF SUB-CLASSES AND FOR APPOINTMENT AS
CLASS COUNSEL FOR THE RATE-MAKING CLAIMS (DKT. NO. 297)**

I. INTRODUCTION

Continued delays and setbacks in their own putative class action apparently have motivated Michael Gross and his colleagues for a third time to interject themselves into this case.¹

Last summer, the Multi-District Litigation Panel denied their request to transfer and consolidate the Tunica and Zuni cases. Order Denying Transfer (Dkt. No. 110). This Court then denied the Tunica plaintiffs' request for leave to intervene here, to establish separate subclasses, and to appoint Gross as interim class counsel over the miscalculated rate claim and all claims in "cap years." Mem. Op. & Order (Dkt. No. 145). Gross' latest Application under Rule 23(g) for Creation of Sub-Classes and for Appointment as Class Counsel for the Rate-Making Claims ("Application"),

¹ Michael Gross applies with J.E. "Gene" Gallegos, Daniel H. MacMeekin and Eric Treisman (hereafter "Gross"). Mem. Supp. Appl. at 12 (Dkt. No. 298), hereafter cited as "Dkt. No. 298." These four solo practitioners are counsel in the putative class action Tunica-Biloxi Tribe v. United States, No. 02-2413 (D.D.C.) ("Tunica"), which like this case asserts the miscalculated rate claim under contracts with the Indian Health Service (IHS).

filed solely in the name of these lawyers and not on behalf of any plaintiff or putative class member, should be similarly rejected. Not only has Gross' constant maneuvering in the Zuni litigation been wasteful and counterproductive, the present request for the creation of subclasses and for his appointment as class counsel finds no support in Rule 23(g).

II. BACKGROUND

“Fourteen months after Zuni was filed, [Gross] filed a separate case in this district, alleging primarily miscalculated rate claims against IHS,” in a putative class action by the Tunica-Biloxi Tribe of Louisiana and the Ramah Navajo School Board. Mem. Op. & Order at 4 (Dkt. No. 145). “[T]o avoid what seemed to be a foreseeable adverse outcome” (id. at 7) following the Tenth Circuit’s ruling in Cherokee Nation v. Thompson, 311 F.3d 1054 (10th Cir. 2002) (“Cherokee I”), Gross and the Tunica plaintiffs “voluntarily dismissed their original action and on December 9, 2002 refiled the complaint in the United States District Court for the District of Columbia.” Mem. Op. & Order at 4 (Dkt. No. 145). Unfortunately, Gross’ hope of finding a more favorable judicial environment in the District of Columbia did not have its intended effect, and in the proceedings before Judge Walton, Gross and his clients suffered a series of significant procedural and substantive setbacks.² The Tunica case was then stayed pending the final outcome of the Cherokee cases in the Supreme Court. Order (Tunica, Dkt. No. 69).

After the Supreme Court decided Cherokee Nation v. Leavitt, 543 U.S. 631 (2005) (“Cherokee III”), Gross filed a motion to reopen the Tunica case. Tunica, Dkt. No. 71. But without

² See Mem. Op. & Order at 11 (Dkt. No. 145) (discussing adverse rulings); see also Pl.’s Opp. to Exp. Mtn. to Intervene at 1-7 and Exs. 1-6 (Dkt. No. 73) (describing and attaching adverse rulings).

waiting for a ruling, Gross in a series of erratic moves: (1) petitioned the MDL Panel to transfer Tunica from the District of Columbia to New Mexico for consolidation with this case (Zuni) and with Ramah Navajo Chapter v. Kempthorne, Case No. 90-957 (D. N.M.) (“Ramah”); (2) then, with the MDL petition still pending, filed an emergency motion in this Court for the Tunica plaintiffs to intervene, for the creation of subclasses, for Gross to be appointed interim class counsel for the miscalculated rate claim (and for all claims in “cap years”), and for an extension of class certification discovery, Exp. Mtn. to Intervene at 4-5 (Dkt. No. 54); and (3) on the eve of the MDL hearing, modified his MDL request by removing Ramah from the consolidation request and seeking instead to have Zuni transferred to the District of Columbia for consolidation with Tunica. Order Denying Transfer at 1 (Dkt. No. 110).

The MDL Panel rejected Gross’ transfer requests, finding that (1) “Movants have failed to persuade us that any remaining, unresolved common questions of fact and law are sufficiently complex and/or numerous to justify Section 1407 transfer in what now is a two action docket;” (2) “[e]ach of the two remaining MDL-1690 actions has been pending in its respective forum for a lengthy period of time;” and (3) “alternatives to transfer exist that can continue to minimize whatever possibilities there might be of duplicative discovery and/or inconsistent pretrial rulings.” Id.

In Gross’ 2005 intervention motion in this Court, Gross charged that the Pueblo’s counsel was failing to undertake necessary discovery regarding the miscalculated rate claim, and that he needed to participate in Zuni’s “crucial class certification discovery” in order to protect the Tunica plaintiffs’ interests. Exp. Mtn. to Intervene at 3 (Dkt. No. 54). See also Intervenors’ Mem. in Supp. at 5 (Dkt. No. 55); Intervenors’ Reply at 7 (Dkt. No. 80). But during this Court’s October 3, 2005,

status hearing Gross acknowledged that the true driving force behind his motion was that Judge Walton was not acting quickly enough to reopen the Tunica case. Clerk's Minutes at 2-3 (Dkt. No. 131).³ Gross also confessed he had no idea whether the Pueblo had conducted discovery related to the miscalculated rate claim, and (contrary to his motion) he asserted that, if allowed to participate in Zuni, Gross now anticipated needing only "minimal discovery." Id. at 3.

This Court rejected Gross' intervention motion, finding that the Tunica plaintiffs were protected by their own case in the District of Columbia, where Judge Walton had "already invested considerable time" and had "already made a number of dispositive rulings" (albeit many of them adverse to Gross' clients). Mem. Op. & Order at 7, 11 (Dkt. No. 145). The Court admonished that "potential forum shopping by the Intervenors should not be condoned." Id. at 11. The Court denied both intervention of right and permissive intervention, and summarily denied the application to appoint Gross as interim counsel. Id. at 12.

After the MDL Panel and this Court rejected Gross' attempts to obtain a position in Zuni, for a time Gross appropriately redirected his efforts back to Tunica, filing a motion to expedite lifting the stay, which Judge Walton promptly granted.⁴ The parties in Tunica then filed dispositive motions, Dkt. No. 298 at 17 n.10, and the Tunica plaintiffs sought leave to reinstate their motion for class certification. Tunica, Dkt. No. 89 (Mar. 23, 2006). But in another erratic change in course, Gross (1) withdrew his motion to reinstate the class certification motion, Tunica, Dkt. No. 96 (May 22, 2006); (2) filed a motion delaying merits briefing to allow Rule 56(f) discovery, Tunica, Dkt. No.

³ See also Mem. Op. & Order at 8 (Dkt. No. 145).

⁴ Pls.' Unopp. Mtn to Exp. Lifting of Stay (Tunica, Dkt. No. 77), and Minute Order (Nov. 7, 2005).

100 (June 1, 2006), which the court promptly granted while dismissing all pending dispositive motions, Tunica, Dkt. No. 101 (June 5, 2006); and (3) instituted a renewed effort to secure a role here in the Zuni litigation.

III. DISCUSSION

Gross now seeks a foothold in this forum by means of a request that subclasses be created and a self-serving Application for appointment as counsel for a miscalculated rate subclass. Gross ignores this Court's October 2005 Order denying his attempt to intervene and be appointed class counsel, which sets forth many of the same reasons this Court should deny Gross' new Application.

The Court should not create subclasses prematurely simply because Gross alleges special skill in one type of claim. His appointment is particularly inappropriate here, considering Gross represents the Tunica plaintiffs whose interests he intends to place above those of the Pueblo of Zuni and the Zuni class (as his Application makes plain). Nor should the Court appoint Gross as a class counsel when he applies without standing, for his own benefit and without the support of any plaintiff. Finally, should this Court decide to certify a class, the Sonosky firm and Lloyd Miller are best able to represent the interests of the class with respect to all claims.

A. This Court should deny Gross' Application based on its October 2005 Order.

Gross' present Application is subsumed within the intervention motion that he filed and that this Court denied last year. Just like last year, Gross requests the creation of subclasses and for his appointment as class counsel to a miscalculated rate subclass. Just like last year, Gross alleges special expertise over the rate claim (along with issues related to carry-forward adjustments and exhaustion of administrative remedies). Compare Dkt. No. 54 at 3 with Dkt. No. 298 at 2, 3-4 and

n.5, 10, 12-13. Just like last year, Gross reiterates his time-consuming, but ultimately unsuccessful Ramah experience in negotiating over equitable remedies. Compare Dkt. No. 55 at 8 with Dkt. No. 298 at 12.⁵ In short, Gross makes the same arguments here that he made last year when seeking intervention, subclasses and appointment as counsel. Compare Mem. Op. & Order at 6 (Dkt. No. 145) with Dkt. No. 298 generally.

This Court found that “none of these reasons either alone or in combination” warranted the Tunica plaintiffs’ intervention, Mem. Op. & Order at 7 (Dkt. No. 145), and denied both intervention and appointment of Gross. Id. at 12. Gross cites no new developments between then and now. Gross should not be allowed essentially to disregard this Court’s earlier ruling and to continue his “forum shopping.” Id. at 11. He is bound by the law of the case.⁶

Gross likely will argue that his recent effort is different from last summer’s because this time he is not requesting “intervention” for his clients under Rule 24 (although he alludes he may yet do so, see Dkt. No. 298 at 18). But the fact that for now Gross seeks to interfere with Zuni only on his own accord, without the support of any client, does not change the underlying nature of his

⁵ With regard to the equitable remedies which Gross claims as a success in Ramah, see Dkt. No. 298 at 12, in 7 years nothing definitive has ever been achieved in actually changing the rate-making system, although hundreds of hours were allegedly devoted to that effort. Gross Dec. at 10-11, ¶ 31 (Dkt. No. 299). Nor have any motions to resolve the issue ever been brought in Ramah. Rather, Gross’ pursuit of equitable remedies on the rate claim was abandoned after he secured no relief on this front, and the only equitable relief to date ever achieved in Ramah stems from the Pueblo of Zuni’s and Mr. Miller’s success in pushing for the final adoption of a BIA CSC policy. Ramah, Dkt. No. 1028 (Plaintiffs’ Progress Report on Work Regarding “Direct Contract Support Cost” Equitable Relief Claim); infra at 20 n.29.

⁶ See McIlravy v. Kerr-McGee Coal Corp., 204 F.3d 1031, 1034 (10th Cir. 2000) (“[T]he law of the case ‘doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.’”) (citation omitted); Tonkovich v. Kansas Bd. of Regents, 254 F.3d 941, 944 n.1 (10th Cir. 2001) (applying law of the case where Court’s earlier decision did not involve “the merits of the case” but subsequent panel would “address essentially the same issue”).

Application. He still wants to insert himself into Zuni, and his present Application is substantively just a repeat of his earlier motion. That Gross now offers no client, much less a class representative, only makes his Application that much less meritorious. See infra at 10-12.

B. Gross has asserted no legitimate reason why the Court should now create subclasses and appoint separate counsel for each.

Rule 23(g) calls for the appointment of one “class counsel.” “If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.” Rule 23(g)(2)(B) (emph. added). This leadership structure ensures efficient decision-making, so that the case will be litigated in a streamlined manner.

To avoid this simple rule, Gross requests the creation of subclasses and then his appointment as counsel for one of the subclasses (the miscalculated rate subclass). But the creation of subclasses and appointment of Gross is premature, where the Court has not yet determined whether any class should be certified. The Court need not address whether the “class [should] be divided into subclasses,” Rule 23(c)(4)(B), and the standards and procedure for doing so, until after it first decides to certify the class. Indeed, and as is common, the Court may well defer any consideration of subclass issues (if any legitimately arise) until the case proceeds much further into the merits.

Even were now the time to consider subclasses, subclasses would neither be necessary nor appropriate. Gross acknowledges that the Sonosky firm is best able to represent the class in all other respects, Dkt. No. 298 at 3 n.3, yet seeks subclasses only because he claims unusual skill in one aspect of a much broader case. However, the creation of subclasses is to be driven by the nature of the claims at issue, not by the specialties of an attorney-applicant. Nowhere in his Application does

Gross consider the appropriate standards for creating subclasses under Rule 23(c)(4)(B), although the existence of a valid subclass is critical to his appointment as its counsel and is the linchpin to his Application.⁷

Subclasses are generally appropriate only where conflicts of interest exist among different groups of class members. See Rule 23(c)(4), 1966 Advisory Comm. Note (“Where a class is found to include subclasses divergent in interest, the class may be divided correspondingly, and each subclass treated as a class.”).⁸ Here, of course, Gross acknowledges that “[t]here is no conflict of interest within the class.” See Dkt. No. 298 at 3. Correctly so, for the absence of any conflict is reflected in Ramah, where a single class has long litigated both of the claims asserted in Zuni, along with a third claim (the shortfall claim, the miscalculated rate claim and the “direct” CSC claim).⁹

Less commonly, subclasses are sometimes created where this course will aid the court in managing the class action. But here, bifurcating this case into subclasses will only complicate future proceedings. As a legal matter, “[e]ach subclass must meet the prerequisites established by [Rules

⁷ Nor does Gross cite any authority for the proposition that he has standing to make such a request, and there is none. No authority supports the proposition that an outsider to a case has standing to make motions without first intervening or appearing through consolidation, and nothing in amended Rule 23(g) indicates that class motions are now free-for-alls where an interested attorney without a case pending here can nonetheless apply for a position. Fuerschbach v. Southwest Airlines Co., 439 F.3d 1197, 1209-10 (10th Cir. 2006) (“[a]rguments inadequately briefed in the opening brief are waived”) (quoting Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 679 (10th Cir. 1998)).

⁸ See Diaz v. Romer, 961 F.2d 1508, 1511 (10th Cir. 1992) (affirming certification of subclasses for inmates testing negative for HIV and those testing positive, where a provision in the settlement involved the segregation of HIV positive inmates); Amchem Products, Inc. v. Windsor, 521 U.S. 591, 626 (1997) (affirming decertification of a class where the district court had failed to certify subclasses when “the interests of those within the single class [we]re not aligned”).

⁹ See Cranston v. Hardin, 504 F.2d 566, 575 (2d Cir. 1974) (where a conflict of interest is “more illusory than real,” the district court’s decision not to create subclasses was not error); Yazzie v. Ray Vicker’s Special Cars, Inc., 180 F.R.D. 411, 416 (D. N.M. 1998) (refusing to create subclasses where class members, though differently situated, did not have “antagonistic” interests).

23(a) and (b)],” Monarch Asphalt Sales Co. v. Wilshire Oil Co. of Tex., 511 F.2d 1073, 1077 (10th Cir. 1975), a showing Gross makes no attempt to make. Supra at 8 n.7 (discussing waiver). As a practical matter, having non-conflicting subclasses could result in separate and inconsistent communications with class members; additional burdens for the Court in scheduling and in reviewing multiple briefs; coordination among five separate law firms; and litigating in two separate sub-proceedings the many issues that cross over both proposed subclasses. (For example, it could result in litigating tolling principles separately for each of the two subclasses.)¹⁰ To complicate his request even further, Gross limits the Tunica miscalculated rate putative class to just Tribal contractors with indirect rates issued by the Department of the Interior, whereas the Zuni case encompasses all Tribal contractors, including the many whose rates are issued by the DHHS Division of Cost Allocation. See Pl.’s Class Mem. at 19-20 and n.27 (Dkt. No. 281).¹¹ This disparity between the narrower Tunica class and the broader proposed Zuni subclass highlights Gross’ inherent conflict. Infra at 14-15.

Generally, what Gross terms “issue classes” (Dkt. No. 298 at 2, citing Rule 23(c)(4)(A)), are

¹⁰ See In re Cendant Corp. Securities Litig., 404 F.3d 173, 202 (3d Cir. 2005) (noting danger that the overuse of subclasses can “fragment[]” the class as well as reduce the plaintiffs’ control over the action); In re “Agent Orange” Product Liability Litig., 996 F.2d 1425, 1436 (2d Cir. 1993) (affirming district court’s decision not to create a subclass because the subclass would require its own attorney which would unnecessarily “increase the amount of legal fees” and noting the district court’s observation that “if we appoint attorneys . . . for everybody who might have . . . somewhat of a conflict of interest, there is hardly going to be any money left for the [class members]”), abrogated on other grounds by Syngenta Crop Protection, Inc. v. Henson, 537 U.S. 28 (2002). These cases caution against creating subclasses where they are unnecessary, particularly if there is little benefit likely to accrue to the subclasses.

¹¹ Surprisingly, even after Mr. Miller brought these many Tribal contractors to Gross’ attention in Ramah, infra at 20 & n.28, Gross still chose to exclude them from the Tunica class, limiting Tunica to “tribal contractors who use OIG [the Department of Interior Office of Inspector General] as their cognizant agency for Indirect Contract Support Costs rates.” See Second Am. Comp. (Tunica, Dkt. No. 11 at 3 ¶ 4).

appropriate only where the Court finds some issues unclassworthy, but seeks “to achieve the economies of class action treatment for a portion of a case.”¹² Gross does not suggest any issues here are unclassworthy, and even if there were such issues, Gross cites no authority indicating that appointment of separate attorneys by subissue is ever appropriate under Rule 23(c)(4)(A).

Apart from Gross’ deficient arguments under Rule 23(c)(4), there is a serious policy issue raised: if late-arriving outside lawyers without any named clients are permitted to enter and carve up a class into subclasses or subissues by asserting limited areas of expertise, particularly when (as here) the first-filing attorneys are perfectly competent to do the whole job, then class actions will degenerate into disputes between counsel to the detriment of the class.¹³

C. Rule 23(g) is not intended to allow attorneys to seek appointment on their own behalf, with no proposed class representative supporting their appointment.

Gross’ effort to take control over Zuni without proposing a class representative should be rejected. Gross argues that an attorney-applicant can be appointed even though he “‘may not have had a relationship with the class representative.’” Dkt. No. 298 at 12 (quoting 1 NEWBERG ON CLASS ACTIONS (FOURTH), at xxiii (2002) (discussing proposed Rule 23(g)). However, NEWBERG quotes at length one commentator’s identification of several problems that would arise from a court’s appointment of counsel who lacks a relationship with the class representative, including conflict with

¹² ANNUAL FOR COMPLEX LITIGATION (FOURTH) § 21.24 (2004); see also Rule 23(c)(4), 1966 Advisory Comm. Note (distinguishing the “adjudication of liability” from proof of “amounts of their respective claims”).

¹³ See comments at SUMMARY OF THE REPORT OF THE JUDICIAL CONF. COMM. ON RULES OF PRAC. AND PROC., Sept. 2002, APPENDIX B (hereafter “COMM. REPORT, APP. B”), e.g. at 201-202 (Ira Rheingold), 203 (David Rubenstein), and 206 (Lawyers’ Comm. for Civil Rights), found at <http://www.uscourts.gov/rules/Reports/ST9-2002.pdf>, pp. 333-334, 335, and 338 of 503, respectively.

the class representative's right to choose counsel, conflict with the ethical rules governing the attorney-client relationship, interference with the class representative's ability to take an active role in the case, and the overriding of attorney-client fee agreements.¹⁴

In fact, NEWBERG may have been addressing a sentence from the draft committee note to proposed Rule 23(g), a note which was removed following a rash of negative comments. The earlier draft note read: "Class representatives may or may not have a preexisting attorney-client relationship with class counsel."¹⁵

Gross cites no other support for the notion that an attorney has standing to apply for appointment without the support of a class representative and without a case already on file here. As far as the Pueblo's counsel is aware, no court has ever granted a self-serving application for appointment from an outsider, where the attorney-applicant lacks a relationship with any proposed class representative.¹⁶

¹⁴ NEWBERG ON CLASS ACTIONS (FOURTH), at xxiii-xxiv (quoting Susan Ford Bedor, Proposed Changes to FRCP 23 – Class Action Rules Undergoing Change, Federal Lawyer 49, 55-56 (May 2002)).

¹⁵ COMM. REPORT, APP. B at 280, <http://www.uscourts.gov/rules/Reports/ST9-2002.pdf>, p. 412 of 503 (showing this sentence struck through). In response to the draft Rule change, one commentator wrote: "Litigants are entitled to retain their own counsel, and they should not have that right extinguished by a court order that effectively replaces their counsel with one or more attorneys they don't know." COMM. REPORT, APP. B at 200 (Mary Alexander), <http://www.uscourts.gov/rules/Reports/ST9-2002.pdf>, p. 332 of 503. Another stated "[t]here is nothing more central to the adversary process than this relationship." COMM. REPORT, APP. B at 204 (Thomas Moreland), <http://www.uscourts.gov/rules/Reports/ST9-2002.pdf>, p. 336 of 503.

¹⁶ Cf. Miller v. Ventro Corp., 2001 WL 34497752, at *13 (N.D. Cal. 2001) ("there appears no authority which would allow the court to appoint lead counsel to a plaintiff who has not requested the appointment"). Undersigned counsel is aware of only one case in which a court appointed class counsel who did not have a prior relationship with the class representative or the case, but there it was at the Court's initiative and not the result of a self-serving attorney application. Lebeau v. United States, 222 F.R.D. 613, 619 (D. S.D. 2004). In Lebeau the court went beyond the applicants to appoint outside class counsel because one applicant had a conflict of interest, id. at 618, and the other, a solo practitioner without support staff, was "not equipped to represent the class without associating with other counsel." Id. at 619. Lebeau is unique in that the court, presented with multiple inadequate applicants for class counsel, sought out and took the "unusual step" of appointing a qualified non-applicant attorney. Id.

By not advancing another representative Gross intimates that the Pueblo of Zuni will continue as the miscalculated rate subclass representative. Yet Gross treats the Pueblo's participation as a mere formality, with his appointment the key issue. A class representative is an important aspect of a class under Rule 23(a)(4), not a "disposable entity." Smith v. Jostens American Yearbook Co., 78 F.R.D. 154, 173 (D. Kan. 1978), aff'd 624 F.2d 125 (10th Cir. 1980).¹⁷

D. Gross should not be appointed because he intends to subordinate the interests of the Pueblo of Zuni and the Zuni class to his own interests and those of the Tunica plaintiffs.

"An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class." Rule 23(g)(1)(B); see also Rule 23(g)(1)(C)(ii) and Rule 23(a)(4). Gross cannot satisfy that standard because his admitted purpose in seeking to be class counsel in Zuni for the miscalculated rate claim is to postpone that part of the Zuni litigation so that he can move forward in Tunica. That cannot possibly be in the best interest of the Zuni class. Accordingly, Gross is not an "adequate applicant" under Rule 23(g)(2)(B).

Gross offers two scenarios for his appointment here as subclass counsel, but both boil down to this: Gross wants to stop prosecution of the rate claim in Zuni, and instead wants all proceedings here to defer to the non-class proceedings in Tunica. Dkt. No. 298 at 17-20. Thus, Gross proposes that the Court certify the miscalculated rate claim as a subclass, appoint Gross as class counsel, and then "stay" the subclass litigation so that Gross can pursue Tunica. Id. at 17-18. As an alternative, Gross suggests the Court "defer or suspend" certification of a miscalculated rate subclass, appoint

¹⁷ The role of subclass representatives "is to represent solely the members of their respective subgroups." Amchem, 521 U.S. at 627 (citation omitted).

Gross as “interim” class counsel for the uncertified subclass (the very same motion he filed last year), and then allow Gross to pursue Tunica. Id. at 19. Either way, Gross seeks appointment in Zuni solely to stop all action on the rate claim while Gross pursues the rate claim asserted in Tunica (notably only on behalf of Tribal contractors with OIG-negotiated rates, see supra at 9 & n.11).

Gross never explains how ‘deferring’ to Tunica can possibly be in the best interests of the Zuni class. Indeed, it is difficult to fathom how ceasing activity here on the rate claim can serve the proposed Zuni subclass’s interest when (1) the Tenth Circuit’s decision in Ramah on this very claim is controlling law here, but not in Tunica; (2) a miscalculated rate class action (Ramah) has already proceeded successfully in this District; (3) Gross’ disjointed efforts have left Tunica no closer to resolution than it was before the case was stayed in 2004 after several adverse rulings; (4) Zuni is for all practical purposes ahead of Tunica, in terms of both discovery and class motion practice; and (5) the Tunica class covers only those Tribal contractors negotiating rates with OIG, but not DCA or other cognizant agencies.

The pretext of “coordination” between the cases is unconvincing. First, the very need for coordination arises only because Gross chose to file a second case asserting the identical rate claim a year after the Pueblo filed this case (albeit for a smaller class). Second, the Sonosky firm has for nearly a decade been coordinating nearly all CSC litigation against IHS.¹⁸ Third, for the past year Gross has had ample opportunity to coordinate Tunica proceedings with Zuni counsel, as the MDL

¹⁸ For instance, the fruits of discovery from the Cherokee cases were all made available to the Zuni case. Similarly, that discovery and the fruits of newer Zuni discovery have been available to the Tribal contractor in Confederated Tribes of the Grand Ronde Community of Oregon v. United States, Case No. 03-2244C (Ct. Fed. Cl.), and all remain available to Tunica on request. Finally, the Sonosky firm this week has proposed a plan to coordinate the several CSC cases against IHS now pending in the Interior Board of Contract Appeals.

Panel strongly suggested a year ago (Dkt. No. 110 at 1), yet he has made no serious attempt to do so. He did not help formulate class certification discovery in this case, nor did he seek copies of the Defendants' production or to participate in any of the fifteen depositions held last year.¹⁹

Gross is simply too close to the Tunica case and to his Tunica clients to make those independent and objective decisions that are necessary fairly and adequately to represent any portion of the putative Zuni class. Gross cannot be appointed where his "representation ... may be materially limited by [his] responsibilities to [Tunica]." N.M. RULES OF PROF'L CONDUCT R. 16-107(B). Gross' appointment in Zuni is admittedly but a device to buy time for Tunica. While this may be in the best interests of Gross and his Tunica clients, it is not "zealous" advocacy of the Pueblo of Zuni or the Zuni class. N.M. RULES OF PROF'L CONDUCT PREAMBLE; see also id. at R. 16-107 Comments [1] and [4] .

This situation is akin to having "divided loyalties," where an attorney represents a different class against the same defendant.²⁰ Here, the Tunica case is narrowly focused on OIG contractors, whereas the Zuni class reaches all Tribal contractors with rates. Gross' proposal to subordinate the

¹⁹ Gross again seeks coordination with Ramah, see Application at 1-2 (Dkt. No. 297), as he did in his MDL motion last year. But this suggestion now is dubious since at the last minute Gross withdrew the Ramah case from the MDL Panel's consideration, implicitly acknowledging that such coordination is unnecessary. Order Denying Transfer at 1 (Dkt. No. 110). Coordination becomes even less likely considering that Judge Hansen's recent "cap years" ruling in Ramah may result in that case now moving to the Tenth Circuit. See Mem. Op. & Order, Ramah Dkt. No. 1042 (Aug. 31, 2006) (sustaining defense against 'cap year' claims).

²⁰ In re Cardinal Health, Inc. ERISA Litig., 225 F.R.D. 552, 558-559 (D. S.D. Ohio 2005) (denying one applicant for lead counsel "because of the possibility of an appearance of divided loyalties" when firm sought to represent different classes with conflicting claims against a common defendant); Lebeau, 222 F.R.D. at 618 (finding one applicant "would have a conflict of interest based upon his representation of those individuals" trying to get into the class); Kayes v. Pacific Lumber Co., 51 F.3d 1449, 1465 (9th Cir. 1995) ("The responsibility of class counsel to absent class members whose control over their attorneys is limited does not permit even the appearance of divided loyalties of counsel.") (citation omitted).

Zuni class to the Tunica case will leave non-OIG contractors with no advocacy at all (as Gross did once before in Ramah, infra at 20 & n.28). The Court should avoid conflicts of interest between the class and class counsel. Plainly, Gross has confessed divided loyalties which disqualify him from any role as class counsel in Zuni.

E. The Sonosky firm will best represent the interests of the Zuni class.

Putting aside that Gross' application for appointment and for creation of subclasses is premature, unwarranted and contrary to Rule 23, Gross is not the "best" counsel for any aspect of this case. The Sonosky firm should therefore be appointed class counsel over the full Zuni class.

Gross would like to monopolize his right to pursue the miscalculated rate claim against every federal agency (here, against IHS) by arguing that he first invented the legal theory. But that is neither so nor the standard. As the Second Circuit wryly observed "[i]t is a novel assertion that attorneys who are victorious in one case may, like a holder of a copyright, claim fees from all subsequent litigants who might rely on or use it in one way or another." Cranston, 504 F.2d at 580. Here, the Sonosky firm and Lloyd Miller are "best able to represent the interests of the class" in all aspects of Zuni. Rule 23(g)(2)(B).²¹

1. The Sonosky firm is accomplished in handling complex litigation and is intimately familiar with such actions against the IHS.

As Judge Hansen in 2002 noted, "Mr. Miller is among this 'limited number of attorneys'"

²¹ The Pueblo has previously provided the Court with information relating to Rule 23(g)(1)(C)(i)'s four-prong test. See Pl.'s Class Mem. at 49-51 (Dkt. No. 281) and Ex. 47 (Miller Aff. and attached Résumé) (Dkt. No. 293); see also Miller Aff. (Dkt. No. 28); Pl.'s Opp. to Exp. Mtn. (Dkt. No. 73 and Ex. 8); Pl.'s Mtn for Appt. of Int. Class Counsel (Dkt. No. 161). This section addresses Rule 23(g)(2)(B)'s requirement when "more than one adequate applicant seeks appointment." But see supra at 10-12 (noting Gross has no standing to apply under Rule 23(g)(2)(B)), & 12-15 (demonstrating Gross' inadequacy due to his divided loyalties to the Zuni class).

with exceptional “‘expertise and accomplishment’ in the area of Indian law generally and indirect cost issues.” Ramah Navajo Chapter v. Norton, 250 F. Supp. 2d 1303, 1312-13 (D. N.M. 2002).

Judge Hansen further noted:

He [Mr. Miller] successfully argued the case of Ramah Navajo School Board, Inc. v. Babbitt, 87 F.3d 1338 (D.C. Cir.1996), was class and direct action counsel in numerous other contract support cost cases, and was Class Counsel for Native Americans in the Exxon Valdez litigation. His expertise in these matters generally and on the issue of direct contract support costs specifically were invaluable to the Class.

Id.; see also Pl.’s Class Mem., Ex. 47 (Miller Aff. and Résumé) (Dkt. No. 293).

The most powerful evidence of Mr. Miller and his firm’s skills and diligence is the landmark victory in the Cherokee III cases and more recently in the Shoshone-Bannock litigation. See Shoshone-Bannock Tribes v. Leavitt, 408 F. Supp. 2d 1073 (D. Or. 2005) (reinstating Tribes’ judgment against IHS in light of Cherokee III). In the wake of the unanimous Cherokee III decision the United States has now paid nearly \$23 million in damages to the Cherokee Nation and the Shoshone-Paiute Tribes, with additional payments now due the Shoshone-Bannock Tribes.

Other Litigation Experience. The Sonosky firm is a leader in complex and landmark trial, appellate and Supreme Court litigation on behalf of Indian Tribes and Tribal organizations such as that pursued in Cherokee III. See <http://www.sonosky.com/practice-profile-26.html> (describing litigation practice and experience).²² Its lawyers have been counsel in ten separate Supreme Court

²² The firm’s class action work includes service as Co-Lead Counsel for the “direct” CSC claims in Ramah and Mr. Miller’s service as class counsel and as Plaintiffs’ Liaison Counsel in In re the EXXON VALDEZ, Case No. A89-095 (D. Alaska) and Case No. 3AN-89-2533 (Alaska Sup. Ct.). Additionally, Mr. Monkman served as the State of Alaska’s outside counsel in the multi-state Tobacco Litigation, served as co-lead counsel for the National Association of Attorneys General Antitrust Task Force in the Insurance Antitrust Litig., aff’d sub nom Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993), and represented plaintiffs in several state court class actions involving the insurance

cases. The firm has also been involved in significant litigation and administrative proceedings regarding Tribal self-determination, the ISDA and the Contract Disputes Act, particularly with regard to disputes against IHS. Id.²³

As all these examples demonstrate, the Sonosky firm also possesses the necessary resources and determination required to pursue this action to completion. In fact, Gross concedes the Sonosky team has “experience in handling class actions and other complex litigation.” Intervenor’s Mem. in Supp. at 8 (Dkt. No. 55); see also Dkt. No. 298 at 3 n.3 (acknowledging the Sonosky firm as the appropriate firm to represent the Zuni class in other respects).²⁴

Experience with IHS and the ISDA. Additionally, the Sonosky firm has been working with IHS on behalf of Tribes since the 1980s, providing the firm with important knowledge that has been

industry. The firm also recovered \$4 million against the United States for one Tribe and a class of approximately 7,000 individual Indians who held interests in trust land on the Fort Peck Reservation, for mismanagement of interest due on their trust funds. Assiniboine and Sioux Tribes of the Fort Peck Reservation v. United States, No. 773-87L (Fed.Cl). With regard to other complex litigation, a particularly notable victory is the 25-year battle in United States v. Sioux Nation, 448 U.S. 371 (1980) (producing the largest judgment ever entered at the time against the United States on an Indian Tribal claim (\$106 million)). A more recent example involves the resolution of complex claims involving Sandia Mountain, through a mix of litigative and legislative work. See Pueblo of Sandia v. Babbitt, 231 F.3d 878 (10th Cir. 2000), and the T’uf Shur Bien Preservation Trust Area Act, Pub. L. No. 108-007, Div. F., Tit. IV, 117 Stat. 279 (2003) (ratifying, in part, agreement between the Tribe and the Departments of Justice, Agriculture and Interior).

²³ In addition to the ISDA matters described in Pl.’s Class Mem. at 50-51 and n.71 (Dkt. No. 281), additional recent representative litigation over the ISDA includes: Shattuck, et al. v. Lucero, et al., Case No. CIV-04-1287 JB/RHS (Aug. 26, 2005 D. N.M.) (Final Judgment) (successfully arguing that the ISDA does not grant Tribal members a private right of action against a Tribe); Appeal of the Three Affiliated Tribes of the Fort Berthold Reservation, IBCA Nos. 4642-2005 through 4644-2005 (IBCA 2005) (negotiating a \$2.1 million settlement involving an ISDA contract with the Bureau of Reclamation); Appeals of the Cherokee Nation, IBCA Nos. 4434/4435-2002 (IBCA 2003) (settling two claims against the BIA for interest under the Prompt Payment Act and Contract Disputes Act). More generally, the Sonosky firm has assisted Tribes with the filing of dozens of claims under the Contract Disputes Act, and assisted Tribes with over ten proceedings in the Interior Board of Contract Appeals.

²⁴ The firm’s resources include twenty-nine attorneys and over twenty paralegals, law clerks and staff across five offices. The firm has document management software acquired for this case, and up-to-date database capacity and expertise necessary to manage the tens of thousands of pages of production exchanged between the parties. The firm maintains a website related to its CSC litigation as a general resource for putative class members. See www.cscclass.net.

the foundation for all the firm's litigation against IHS. During the 10-year Cherokee litigation against IHS, Mr. Miller and the Sonosky team demonstrated not only their fluency in government contract and federal appropriations law, but also their intimate familiarity with the nuances of the various IHS Circulars, IHS's "queues" and "shortfall" reports, IHS Budget Justifications and appropriations acts, and IHS restructuring efforts. Indeed, it is this knowledge of IHS policies and practices which led to the expansion of the Ramah case to include "direct" CSC claims. Ramah, 250 F. Supp. 2d at 1305-06, 1307 (Fdgs. 3 & 5), 1311-12 (all discussing direct CSC claim and relation to IHS). The miscalculated rate claim in Zuni arises against a different set of Defendants than Ramah, and the Defendants here raise markedly different defenses. It involves Tribes dealing with the DHHS-DCA, whom Gross continually neglects. The Sonosky firm's deep knowledge of IHS and its many years of litigation against IHS provide an enormous advantage in this case, challenging IHS's administration of the ISDA and the agency's diverse and ever-shifting methods for calculating and paying CSCs.

As detailed in the Pueblo's Class Memorandum (Dkt. No. 281 at 49-51), a major part of the Sonosky firm's practice involves ISDA contracting and compacting activities; including lobbying ISDA's many amendments; agency negotiated rulemaking under those amendments; eleven years of service on the IHS CSC Work Group; CDA claims and ISDA litigation; contract and compact negotiations; and regularly advising clients about the ISDA's requirements. The Sonosky firm has negotiated scores of contracts with IHS for Tribal contractors in New Mexico, Arizona, Nevada, Utah, Idaho, Montana, Wisconsin, Minnesota, California, Oklahoma, Alaska and elsewhere. The

Sonosky firm's expertise in the ISDA, particularly as it relates to IHS, is unrivaled.²⁵

The Miscalculated Rate Claim. The Sonosky firm is not a “new player[]” with regard to the miscalculated rate claim, as Gross suggests. Dkt. No. 298 at 20. To the contrary, the Sonosky firm has been mindful of the miscalculated rate issue since it was first identified by Pueblo expert James Sizemore 20 years ago during the development of the 1988 ISDA Amendments.²⁶ When Gross brought suit against the BIA in 1990 for failing to implement those Amendments, the Sonosky firm supported that effort, focusing on its impacts on IHS contractors. At Gross' request the Sonosky firm filed its first amicus brief in Ramah in 1992 on behalf of Chugachmiut, Inc., a multi-Tribal organization administering contracts not just with the Secretary of the Interior, but with the Secretary

²⁵ Gross' team qualifications are more mixed. Gross' Application suggests he has limited manpower available for prosecuting a case this size. According to his declarations, Gross' team is comprised of only four solo practitioners, Dkt. No. 298 at 12, with one full-time support staff person, Gallegos Decl. ¶ 14 (Dkt. No. 300), and the Tunica plaintiffs apparently “have already underwritten a significant portion of the costs of prosecuting” the miscalculated rate claims. Dkt. No. 298 at 19, citing Gross Decl. ¶ 42 [sic] (Dkt. No. 299). On the merits (and according to his website <http://macmeekin.com>, Westlaw and an internet search), Mr. MacMeekin is only a specialist in “Island Law” unique to Guam and has handled only one reported Indian case (which failed in part for lack of service). Burt Lake Band of Ottawa and Chippewa Indians v. Norton, 217 F. Supp. 2d 76 (D.D.C. 2002) (dismissing suit for lack of exhaustion and failure to serve named defendants within 120 days). Mr. Treisman's reported Indian litigation (outside Ramah) amounts to two unsuccessful efforts to undo Tribal sovereignty and self-government. See Walton v. Tesuque Pueblo, 443 F.3d 1274, 1279-1280 (10th Cir. 2006) (rejecting (*inter alia*) contention that the ISDA abrogates Tribal sovereign immunity); Gallegos v. Pueblo of Tesuque, 46 P.3d 668, 678 (N.M. 2002) (rejecting (*inter alia*) contention that Tribe's sovereign immunity was waived under the Indian Gaming Regulatory Act (25 U.S.C. §§ 2701-2721) in the absence of any effective Tribal-State compact, and rejecting as a “distinction without a difference” the contention that sovereign immunity applies to “governmental” but not “commercial” activities). And while Mr. Gallegos' successes are noted in the Application, his record of defeats includes a stunning punitive damage award for his breach of fiduciary responsibilities to a fellow attorney-shareholder. Walta v. Gallegos Law Firm, P.C. and J.E. “Gene” Gallegos, 40 P.3d 449, 462 (N.M. Ct. App. 2001), cert. denied 41 P.3d 345 (N.M. 2002) (sustaining \$100,000 personal punitive damage verdict for numerous “culpable” acts).

²⁶ S. REP. NO. 100-274, at 13 & 18 (1987) (citing Mr. Sizemore's report, DETERMINING THE TRUE COST OF CONTRACTING PROGRAMS FOR INDIAN TRIBES (1987) (excerpt attached hereto as Pl. Ex. 1)) and at 15, 32-33, 37-38 (discussing the rate and carry forward issues described in Mr. Sizemore's report). The underfunding of indirect CSCs was a major impetus for the 1988 Amendments. Ramah Navajo Chapter v. Lujan, 112 F.3d 1455, 1457, 1462 (10th Cir. 1997).

of Health and Human Services. Ramah, Dkt. No. 91 at 3 (noting that “the problems described by Plaintiff are endemic to all contracts administered under the Act, and are not confined to the Bureau of Indian Affairs or the Department of the Interior”).²⁷

The Sonosky firm also stepped in when Gross initially excluded from the 1999 Ramah class settlement several Tribal contractors performing contracts primarily with IHS, resulting in nearly \$1 million distributed to IHS contractors who otherwise would have been written out of the settlement.²⁸ Again, the Sonosky firm played a pivotal role in Ramah when Gross failed timely to assert a claim against the BIA related to “direct” contract support costs (which have long been recognized by IHS) and in the follow-on equitable relief work on that claim. Ramah, 250 F. Supp. 2d at 1307 (Fds. 3 & 5) (noting that the Pueblo of Zuni formulated the direct CSC claim).²⁹

²⁷ Gross is wrong to take issue with how the Pueblo addresses the carry-forward system. The Pueblo views the carry forward issue as an element of damages rather than a separate claim. As the Pueblo contends and expert James Sizemore’s Report describes, IHS’s requirement that Tribal contractors must suffer and report underpayments associated with the shortfall and the miscalculated rate claims improperly suppresses future indirect cost rates. Pl.’s Class Mem., Pl. Ex. 32 at 13 (Dkt. No. 289). However, if not for the allegedly illegal underpayments, Tribal contractors would not take issue with the carry forward system because the root problem does not lie in that system. Whether the carry-forward issue is asserted as a separate claim is a matter of strategy that did not warrant Gross’ appointment last year, Mem. Op. & Order at 6, 10-11 (Dkt. No. 145), and does not warrant his appointment now. Significantly, Gross has never formally asserted the so-called “carry forward claim” in Ramah despite his new assertion that doing so is pivotal. Nor (despite his suggestion otherwise) has he ever asserted a separate “carry forward claim” in Tunica, but rather sets forth the carry forward issue only in the “operative facts” section of the Complaint. Tunica, Dkt. No. 11 at 9 ¶ 23. Here, Gross acknowledges the carry forward issue is but a “consequence” of the rate error. Gross Dec. at 11, ¶¶ 33, 34 (Dkt. No. 299).

²⁸ See Notice of Distribution of Partial Settlement: Ramah Navajo Chapter v. Babbitt, 65 Fed. Reg. 4989, 4990-91 (Feb. 2, 2000) (Part IV) (discussing, *inter alia*, the DHHS Division of Cost Allocation “DCA” class members’ claims). See also supra at 9 n.11 (discussing Gross’ continued neglect of these contractors in Tunica).

²⁹ As co-lead counsel for the “direct” CSC claim, Mr. Miller led and recently concluded two years of negotiations with the BIA on its first CSC policy. This policy recognizes the right of BIA Tribal contractors to direct CSCs, effectively resolving most of the direct CSC equitable relief claims that the Pueblo originally brought in Ramah. See Ramah, Dkt. No. 1028 (Plaintiffs’ Progress Report on Work Regarding “Direct Contract Support Cost” Equitable Relief Claim) (discussing steps leading to BIA Nat’l Policy Mem. No. NPM-SELFD-1 (May 8, 2006)). Supra at 6 n.5.

While the Sonosky firm recognizes that Gross (together with Bryant Rogers and his firm) achieved an important victory in Ramah (notwithstanding that the reserved claims have either languished or now failed, supra 6 n.5, 14 n.19) notably other attorneys with similarly situated clients did not then vie for “command” of the case. Rather, the Sonosky firm supported Gross’ and Rogers’ work through amicus filings, by raising important protections for absent class members, and by raising a key additional claim. The fact that the Sonosky firm did not compete for a more visible role in Ramah is a credit to the firm, not a demerit, reflecting its longstanding dedication to IHS contractors and its diligence in investigating, identifying and litigating claims and defenses against IHS wherever they might arise.

Moreover, in Zuni the Sonosky firm has already demonstrated its commitment to adequately pursuing the miscalculated rate claim against IHS, having devoted hundreds of hours engaging in class discovery, see Rule 23(g)(1)(C), ultimately leading to the Pueblo’s class certification motion filed this summer which carefully outlines the reasons why the Zuni case is class worthy, specifically identifies the miscalculated rate claim as one claim in the Zuni class (“Claim 3”), describes the factual basis and the legal theory for that claim, and seeks certification of that claim. Pl.’s Class Mem. at 2, 19-24 (Dkt. No. 281).³⁰

³⁰ Class discovery has included propounding and responding to massive discovery requests, reviewing tens of thousands of pages of documents exchanged between the parties, taking six and defending nine depositions across the country, and handling three discovery disputes. The parties also took part in a contract sampling exercise designed to secure and analyze a representative sample of all putative class member contracts. The Sonosky firm also has retained two expert witnesses, including James Sizemore, see Dkt. No. 289, Pl. Ex. 32 (Expert Report describing the miscalculated rate claim and the subordinate carry forward issue), as well as two accountant witnesses with extensive knowledge concerning Tribal contractors’ indirect cost issues.

2. Appointment of the Sonosky firm would avoid conflicts in the leadership and management of the Zuni class.

The structure Gross proposes will both unnecessarily complicate this litigation and produce conflicts in leadership and strategy. Supra at 9, 14-15. Gross seeks appointment over only the miscalculated rate claim, but makes no mention of how the many claims and defenses that are common across all claims will be prosecuted. Pl.’s Class Mem. at 41-43 (Dkt. No. 281). For instance, the Defendants’ Motion to Dismiss implicates issues of equitable tolling, statutory tolling, exhaustion under the CDA, and the ability to bring separate statutory claims under the ISDA. Opp. Mot. to Dismiss at 7 n.5, 12-20 (Dkt. No. 111). Under Gross’s structure, the Sonosky firm would apparently no longer brief these case-wide issues alone, and leadership over everything from overall strategy to day-to-day activities would be lost as nearly every decision became a joint issue to be negotiated. As noted supra at 13-15, Gross’ proposal also raises serious questions regarding conflicts of interest in his proposed simultaneous representation of a larger subclass here and his Tunica clients over the rate claim. His appearance here would certainly hurt the Zuni class given that Gross’ desired end is to stop this class claim in its tracks in favor of Gross’ Tunica case. In contrast, leaving the Sonosky firm in place as class counsel over all claims and all defenses assures a coherent and consistent strategy with efficient decision-making over all aspects of the case.³¹

³¹ See also Howard Gunty Profit Sharing Plan v. Carematrix Corp., 354 F.Supp.2d 18, 25 (D.Mass 2000) (declining to appoint co-lead counsel where doing so was “likely to complicate needlessly the mechanics of the litigation, including communication between the lead plaintiffs and between attorneys for the plaintiffs and for the defendants”); Miller v. Ventro Corp., 2001 WL 34497752, at *13 (reaffirming a “preference for a single law firm to represent the group”).

F. The Pueblo of Zuni's choice of counsel should be respected.

In appointing the applicant “best able to represent the interests of the class,” “one important consideration might be the applicant’s existing attorney-client relationship with the proposed class representative.” Rule 23(g)(2)(B), 2003 Advisory Comm. Note. This Committee Note reflects the sentiment of numerous lawyers commenting on the proposed amendments to Rule 23(g). See supra at 10-11 (discussing comments and NEWBERG). As then stated by the President-elect of the Association of Trial Lawyers of America: “The critical thing is that parties are represented by lawyers whom they know and trust.” COMM. REPORT, APP. B at 215 (Mary Alexander), <http://www.uscourts.gov/rules/Reports/ST9-2002.pdf>, p. 347 of 503.

The Sonosky firm has a longstanding relationship with the Pueblo of Zuni, having represented it since 1998 in complex claims and litigation; in negotiations with the BIA to develop and implement the first-ever BIA CSC policy; in a national lobbying effort to secure additional contract support cost appropriations; and in a variety of unrelated legal matters. Here, the Pueblo of Zuni stands firmly behind the Sonosky firm as best able to represent it and the interests of the class. Pl.’s Ex. 2, ¶¶ 9-10 (Aff. of Bryceson Pinto) (attached hereto). Additionally, the Pueblo’s leadership has indicated that they have no confidence in Mr. Gross due to events transpiring in the 1990s, and thus are very uncomfortable with the possibility of Gross representing the Pueblo in any aspect of the Zuni litigation. Id. ¶¶ 3, 5, 10. The Pueblo’s choice of counsel should be respected.

CONCLUSION

Gross is understandably frustrated with the lack of forward progress in Tunica, particularly since Cherokee III is already 18 months old. However, his continuous attempts to interject himself

into the Zuni litigation have been wasteful and disruptive, they have been contrary to the interest of the putative class and they have been without legal foundation. On the other hand, Mr. Miller and the Sonosky firm have done considerable and successful work over more than a decade identifying, investigating and litigating CSC claims against IHS; they have ample experience handling complex litigation and class actions; they have unparalleled knowledge of the ISDA, related law and the inner workings of IHS; and they have the resources necessary to protect the interests of the putative class in litigation against the United States.

For all of the foregoing reasons, Plaintiff respectfully requests that the Court deny Gross' Rule 23(g) Application.

Respectfully submitted this 6th day of September 2006.

SONOSKY, CHAMBERS, SACHSE,
ENDRESON & MIELKE, LLP

/s/ Melanie Baca Osborne

By: _____

Lloyd B. Miller
David C. Mielke
Arthur Lazarus, Jr.
Richard D. Monkman
Melanie Baca Osborne
Vanessa L. Ray-Hodge
Jennifer J. Thomas
Katherine E. Morgan
500 Marquette Avenue, N.W., Suite 1310
Albuquerque, NM 87102
Telephone: (505) 247-0147

