

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

PUEBLO of ZUNI,)	
)	
Plaintiff,)	
)	
v.)	No. CIV 01-1046 WJ/WPL
)	
UNITED STATES of AMERICA;)	
MICHAEL O. LEAVITT, Secretary of the)	
United States Department of Health and)	
Human Services; and CHARLES W. GRIM,)	
Director of the Indian Health Service,)	
United States Department of Health and)	
Human Services,)	
)	
Defendants.)	

**DEFENDANTS’ OPPOSITION TO PLAINTIFF’S COUNSEL’S MOTION FOR
APPOINTMENT OF INTERIM CLASS COUNSEL**

INTRODUCTION

Plaintiff’s Counsel’s Motion to be appointed “interim” class counsel, filed not at the outset but at the close of class certification discovery, provides absolutely no basis for this Court to take the unusual step of appointing interim class counsel. Compounding the absence of justification is the fact that, by the time this Motion is fully briefed, the parties will have completed class certification discovery and Plaintiff will then have 30 days to file a motion for class certification. In other words, there is no reason at this late date for the Court to appoint interim class counsel when the Court is about to consider whether a class should be certified at all. Nothing that Mr. Miller or Plaintiff needs to do at this juncture requires, or would even benefit from, his being appointed interim class counsel. As in the normal course of putative class

action litigation, Mr. Miller, as counsel for Plaintiff Pueblo of Zuni, may file pleadings and motions, conduct discovery and settlement negotiations, and move for class certification, all without being appointed interim class counsel.

Conversely, there are legitimate reasons that the Court should not appoint Mr. Miller interim class counsel. Because this is Mr. Miller's second attempt to certify a class of Indian Health Service ("IHS") contractors (his first attempt was unsuccessful), the Court and the parties should be particularly careful to ensure that putative class members are not misled about the status of this case and its effect on their putative claims. Appointing interim class counsel in this case risks suggesting to putative class members that they need not pursue individually any claims that they believe they may have. Defendants have vigorously and continuously argued that each contractor must timely and properly exhaust its administrative remedies (called "presentment") under the Contract Disputes Act ("CDA"), 41 U.S.C. § 605(a), and that the failure to do so bars a court from assuming jurisdiction over that claim. As such, it is critical that putative class members not be confused or misled about the status of this case such that they determine not to assert any claims for relief that they believe they may have.

Because appointing interim class counsel under these circumstances serves no benefit but can only serve to confuse and mislead putative class members, the Court should summarily deny Plaintiff's Counsel's Motion.

ARGUMENT

I. THERE IS NO JUSTIFICATION FOR APPOINTMENT OF INTERIM CLASS COUNSEL IN THIS CASE.

Federal Rule of Civil Procedure 23(g)(2)(A), added to the Federal Rules in 2003, permits courts to appoint interim class counsel under certain circumstances. See Fed. R. Civ. P. 23(g)(2)(A). As the advisory committee’s notes explain, such appointment may be had “if necessary to protect the interests of the putative class.” Fed. R. Civ. P. 23(g)(2)(A) advisory committee’s note (2003). The note explains that “ordinarily,” the work preceding the class certification decision—discovery, motions, and settlement discussions—will be handled by the lawyer who filed the action. See id. It is only when there is a rivalry or other uncertainty that courts may appoint interim class counsel as appropriate. See id. There is little case law interpreting this new provision, but there can be no question that the appointment of interim class counsel is the exception and not the rule. Thus, some showing of necessity or unique circumstances is warranted before appointment of interim class counsel should be made.

A. Plaintiff’s Counsel Has Not Provided Sufficient Justification Warranting His Appointment as Interim Class Counsel.

Plaintiff’s Counsel provides only a cursory (two-page) explanation of why he wishes to be appointed interim class counsel. (Mot. at 1-2.) Both his primary and secondary justifications lack merit. His main justification is based on a perceived “conflict” with another attorney, Michael Gross. Mr. Gross represents two other ISDA contractors, the Tunica-Biloxi Tribe of Louisiana and the Ramah Navajo School Board, in a putative class action lawsuit very similar to this one, Tunica-Biloxi Tribe and Ramah Navajo School Board. v. United States et al., No. 02-

2413 (D.D.C.). Mr. Miller and Mr. Gross are also co-class counsel in a case brought against the Bureau of Indian Affairs (“BIA”), Ramah Navajo Chapter v. Norton, No. 90-957 (D.N.M.).

Any actual or perceived conflict between Mr. Miller and Mr. Gross has already been resolved. Mr. Gross has twice sought to involve himself and his clients in this litigation, but both times has been rebuffed. First, Mr. Gross filed a motion to consolidate Tunica with this case under 28 U.S.C. § 1407, the multidistrict litigation statute. After briefing and oral argument, the Judicial Panel on Multi-District Litigation denied the motion in its entirety (docketed as #110). Second, Mr. Gross filed a motion to intervene in this case on behalf of his clients, Tunica and Ramah, a motion that this Court denied on October 18, 2005 (docketed as #145).¹ The Court concluded that intervention was improper because of the individualized nature of these ISDA breach of contract cases, as well as because Mr. Gross’s clients had their own action in which to protect their interests. (Mem. Op. at 7-9.) Any actual or perceived conflict with Mr. Gross has thus been resolved.

Plaintiff’s Counsel goes on to suggest that the rivalry between Mr. Gross and Mr. Miller may be renewed if the Tunica Court transfers Mr. Gross’s case to the District of New Mexico for consolidation with this case. (Mot. at 2.) Such concern is likely unwarranted and certainly premature. Indeed, Mr. Gross has not even moved to transfer his case back to the District of

¹ Defendants opposed both of these motions on the basis that, inter alia, these cases are individual contract actions that require individualized factual development into the specific factual circumstances of each claimant (e.g., the terms of the contracts, the amounts awarded under each contract, whether the claimant has released or otherwise waived its claims, and whether the claimant has satisfied the jurisdictional prerequisites of the CDA).

New Mexico. In any event, any such motion would likely fail because of the prior rulings of this Court and the Judicial Panel on Multi-District Litigation, described above, regarding consolidation. Mr. Gross would also have to overcome the fact that he originally filed his lawsuit in the District of New Mexico, voluntarily dismissed it upon receipt of negative precedent in the Tenth Circuit, and then refiled in the District of Columbia. (Mem. Op. at 11.) It is likely that any attempt on Mr. Gross's part to transfer his case back to the District of New Mexico would be rejected as improper forum shopping.

Plaintiff's Counsel's concern is also premature. Not only is no motion to transfer and consolidate currently pending, if Mr. Gross were to make such a motion at some later date, Mr. Miller would have ample opportunity to respond with any concerns that he has or seek to be appointed as interim class counsel, if appropriate, at that time. Appointing Mr. Miller interim class counsel now, without consideration of any other candidates, is not only unnecessary, but would give Mr. Miller an unfair advantage with respect to other applicants. By this Motion, Mr. Miller appears to be attempting to preempt any competition that he might otherwise face if there were an actual rivalry with respect to representation of the putative class. In fact, Rule 23 directs courts to facilitate competing applications in order to "appoint the applicant best able to represent the interests of the class." Fed. R. Civ. P. 23(g)(2)(B). Any attempt by Mr. Miller to short-circuit this process, should it even be necessary, should be rejected.

As a secondary justification, Mr. Miller states that he seeks appointment as interim class counsel in order to "confirm" his authority to undertake discovery, file motions, and engage Defendants in settlement discussions. (Mot. at 2.) As noted in Rule 23's advisory committee's

notes and recognized in the normal course of putative class litigation, there is no impediment to date that has prevented Mr. Miller from filing motions or conducting class certification discovery. In fact, if Mr. Miller believed that there was some impediment, he likely would have moved for appointment as interim class counsel at the start of class certification discovery in April 2005 and not at its close. Similarly, there is nothing that prevents Mr. Miller from engaging in settlement discussions with Defendants. He acknowledges as much by stating that the appointment would merely serve to “confirm” (and not “authorize”) his authority to engage in settlement negotiations. Appointment of interim class counsel for these purposes is thus entirely unwarranted.

B. Appointment of Interim Class Counsel At This Time Would Be Imprudent as It Could Mislead Putative Class Members.

As Mr. Miller acknowledges, the appointment of interim class counsel does not prejudice the question of whether a class should be certified at all; it is an interim appointment that a court may make under certain circumstances before the court has even considered the legal sufficiency or appropriateness of a class action lawsuit under Rule 23. See Fed. R. Civ. P. 23(g)(2)(A). Nonetheless, the appointment of interim class counsel could mislead or confuse putative class members about the status of this case and whether they should individually pursue any claims that they believe they may have. Especially in light of the fact that Mr. Miller already has unsuccessfully attempted to certify a class of IHS contractors in Cherokee Nation v. United States, 199 F.R.D. 357 (E.D. Okla. 2001), the Court and the parties should avoid taking any action in this subsequent putative class action--such as appointment of interim class counsel--that

might cause the putative class members to decline to pursue their rights on an individual basis.

Defendants intend to oppose class certification for reasons that include those that formed the basis of the Cherokee Court's determination that class certification is inappropriate, most notably, that the claims lack commonality and typicality and that the individual issues related to each ISDA contractor's claim predominate over any class issues. See Cherokee Nation, 199 F.R.D. at 363-66;² see also Fed. R. Civ. P. 23 (outlining factors that courts must consider before certifying a class). Defendants also intend to oppose class certification on jurisdictional grounds, i.e., that reviewing courts lack subject matter jurisdiction over any claims that were not first timely and properly presented to IHS pursuant to the Contract Disputes Act, 41 U.S.C. § 605(a). See, e.g., James M. Ellett Constr. Co. v. United States, 93 F.3d 1537, 1541-42 (Fed. Cir. 1996);

² The class definition that Mr. Miller sought in Cherokee was: "All Indian tribes and tribal organizations operating Indian Health Service programs under contracts, compacts or annual funding agreements authorized by the Indian Self-Determination Act, 25 U.S.C. § 450 et seq., that were not fully paid their contract support cost needs, as determined by IHS, at any time between 1988 and the present." 199 F.R.D. at 360. After discovery, class briefing, and a hearing on class certification, the court ruled that it would not certify a class because the elements of commonality, typicality, and adequacy of representation had not been not satisfied. See id. at 363-66. More specifically, the court found that a review of each ISDA contractor's contract would be necessary and would cause the litigation to devolve into a series of "mini-trials that would defeat the judicial efficiency which a class action is designed to promote." Id. at 363. The court recognized that each contract is the subject of an individual negotiation between the IHS and the contractor and that "there could be a variety of different legal and remedial theories for each tribe, dependent on its contractual terms." Id. at 364. The court finally recognized that because any damages would come from the agency's budget, which was necessarily finite, the class representatives' interests were antagonistic to those of the putative class members. See id. at 365-66. Rather than appeal the decision, Mr. Miller filed this case, a second class action lawsuit, on behalf of a putative class defined as "all tribes and tribal organizations contracting with IHS under the ISDA between fiscal years 1993 to the present," (Am. Comp. ¶ 53), a definition identical to the one rejected in Cherokee except for the time period.

see also 25 U.S.C. §§ 450m-1(a), (d) (directing that the CDA applies to all claims by ISDA contractors against the government for monetary relief). Additional factual development during discovery in this case has uncovered new bases upon which to challenge class certification. At bottom, the class action device is “an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only[,]” and the reviewing court must undertake a “rigorous analysis” to make the certification determination. See Gen. Tel. Co. v. Falcon, 457 U.S. 147, 155, 160 (1982) (citation and internal quotation marks omitted). The rigorous legal standard for class certification, the non-waiveable jurisdictional requirements of the CDA, and the fact that a district court has already declined to certify a class of IHS contractors direct that the Court and the parties should take care to ensure that the putative class members are not lulled into complacency with respect to any claims that they believe they might have.³

It should also be noted that Judge Hansen (the original judge on this case) rejected an earlier attempt by Mr. Miller to send a precertification notice to putative class members about

³ Defendants recognize that in 1993, a class of BIA contractors was certified in Ramah Navajo Chapter v. Norton, No. 90-957 (D.N.M.). This decision pre-dates by eight years the denial of class certification in Cherokee and was based on what Defendants respectfully urge was an erroneous conclusion about the need for each ISDA contractor to “present” its contract claims to IHS under the CDA, 41 U.S.C. § 605(a), before bringing suit. Defendants explain this error, and the implicitly overruling of the decision, in more detail in its briefs in support of their Motion to Dismiss in Part for Lack of Subject Matter Jurisdiction (Mem. docketed as #59 and Reply docketed as #132). Moreover, the Cherokee Court specifically distinguished Ramah by explaining that “the United States did not oppose class certification on any of the grounds set forth in Rule 23 [thus] the court in Ramah never had the opportunity to evaluate the proposed motion for class certification pursuant to Rule 23(a) qualifications.” 199 F.R.D. at 366 n.1. The Cherokee Court accordingly found “the decision in Ramah of little assistance to the case at bar.” Id.

this case. In 2002, Mr. Miller wrote to Judge Hansen and asked whether he could notify the putative class members about the case, its status, and the impact on their rights (Ex. A). Judge Hansen responded with a clear and unequivocal “no” (Ex. B).⁴ Plaintiff’s Counsel’s similar attempt to “jump the gun” and be appointed interim class counsel before the Court considers the legal sufficiency of the proposed class should likewise be rejected.

C. Adequacy Considerations Also Militate Against Appointment of Plaintiff’s Counsel as Interim Class Counsel.

The bulk of Plaintiff’s Counsel’s Motion involves a discussion of Mr. Miller’s qualifications to be appointed interim class counsel. (Mot. at 2-8.) Although Rule 23(g)(2)(A) does not set forth the qualifications for appointment of interim class counsel, it is presumed that the test would be similar to that for class counsel under Rule 23. Under Rule 23(g)(1)(B), courts must determine that the prospective attorney will “fairly and adequately represent the interests of the class.” Fed. R. Civ. P. 23(g)(1)(B). To make this assessment, courts must consider “the work counsel has done in identifying or investigating potential claims in the action, counsel’s experience in handling class actions, other complex litigation, and claims of the type asserted in the action, counsel’s knowledge of the applicable law, [] the resources counsel will commit to representing the class; [and may consider] any other matter pertinent to counsel’s ability to fairly and adequately represent the interests of the class.” Fed. R. Civ. P. 23(g)(1)(C).

While Defendants reserve all of their arguments related to whether Mr. Miller is an

⁴ Notwithstanding Judge Hansen’s denial of Mr. Miller’s request to send putative class members a precertification notice, Mr. Miller has communicated with tribal leaders over the years via a website, www.cscclass.net, regarding the status of this case.

adequate representative for purposes of class certification, Defendants point out for present purposes that Mr. Miller's adequacy already has been challenged by putative class members. Specifically, as part of his Motion to Intervene, Mr. Gross questioned whether Mr. Miller had done sufficient work in "identifying or investigating potential claims" and whether he had sacrificed certain claims for others. (Mem. in Support of Mot. to Intervene at 6-9; docketed as #55; Reply in Support of Mot. to Intervene at 6-10; docketed as #80.) In support of his allegations, Mr. Gross filed evidence, purportedly under seal and ex parte.⁵ Although Defendants have not seen this evidence and, as such, cannot ascertain whether and to what extent it actually addresses Mr. Miller's adequacy, the fact of this assertion by other putative class members should caution against appointing Mr. Miller interim class counsel.

CONCLUSION

For the foregoing reasons, Plaintiff's Counsel's Motion for Appointment of Interim Class Counsel should be denied.

Respectfully submitted,

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⁵ Defendants filed a motion to compel service of Mr. Gross's Unredacted Reply and all exhibits (docketed as #84). The Court, in denying the motion to intervene, also denied as moot Defendants' Motion. (Mem. Opin. at 14.)

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Dated: December 5, 2005

CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2005, 2005, I sent, via electronic mail, a copy of Defendants' Opposition to Plaintiff's Counsel's Motion For Appointment of Interim Class Counsel, with exhibits, addressed to:

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