

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,)	
)	
v.)	Case No. CIV 01-1046 WJ/WPL
)	Filed Electronically
UNITED STATES OF AMERICA; <i>et al</i>)	
)	
Defendants.)	
_____)	

**REPLY MEMORANDUM IN SUPPORT OF MOTION OF PLAINTIFF PUEBLO OF
ZUNI’S COUNSEL LLOYD B. MILLER FOR APPOINTMENT
AS INTERIM CLASS COUNSEL (Dkt. 161)**

Appointment of interim class counsel pursuant to Fed. R. Civ. P. 23(g)(2)(A) ought to be a routine matter when there is no longer any competition and where the class representative’s choice is certainly qualified. *Goplen v. 51Job, Inc.*, 2005 WL 1773702, at * 2 (S.D.N.Y.) (seeing “no reason to withhold . . . approval” of “experienced and competent” counsel selected by the plaintiff).¹ Although the Defendants do not see it that way, their arguments against certification fall of their own weight.

First, Defendants argue that a Rule 23(g)(2)(A) appointment requires “rivalry” among competing counsel. Opp. at 3. But Rule 23(g)(2)(A) on its face contains no such requirement, and the fact that rivalry would be an added reason for making an appointment does not mean that the lack of “rivalry” is a reason not to. Indeed, the presence of subparagraph (B) in the Rule (expressly

¹ *Id.* at * 2 (“The Webster Group has selected Milberg Weiss as “lead counsel” (the phrase used in its motion papers) and asks the Court to approve that selection. There is no reason to withhold that approval. Milberg Weiss is experienced and competent in the area of representing plaintiff investor classes in securities litigation.”)

addressing rivalry situations) confirms that no such requirement should be implicitly read into subparagraph (A).

Second, Defendants argue that the Pueblo has advanced insufficient reasons for an appointment. But not only is an interim appointment under the Rule routinely appropriate in any putative class action; here there is ample reason given this Court's recent history with one unsuccessful intervenor, together with that intervenor's stated intention to continue seeking to inject itself into this litigation. Motion at 2 (noting Mr. Gross's and his clients' stated intent to seek to transfer their separate action to this District through 28 U.S.C. § 1404, for consolidation with this action). Defendants' response that the appointment motion should be deferred to see if such a transfer actually occurs (Opp. at 4) is both imprudent and in tension with the Defendants' suggestion three pages earlier that the instant Motion has been filed, not too early, but too late (*id.* at 1). (As for the latter point (Opp. at 1, 6), it was certainly reasonable for the Pueblo to defer its Rule 23(g)(2)(A) motion until Mr. Gross's intervention motion—filed only weeks after this action had been reactivated—was resolved along with the possibility of any reconsideration motion or interlocutory appeal.)²

² Defendants are wrong that Mr. Gross's failure before the Multidistrict Litigation Panel under 28 U.S.C. § 1407 forecloses a transfer motion under § 1404. Opp. at 5. Although there are some common aspects, the standards under the two sections are vastly different. Defendants are also wrong to suggest that the parties are on the eve of class certification motion practice. Although at one time the parties had contemplated that the Pueblo's certification motion would be filed within 30 days of the close of discovery, Chief Magistrate Judge Garcia's Scheduling Order of April 21, 2005 (Dkt. No. 52) did not so provide. More gravely, ongoing motion practice challenging Defendants' failure fully and timely to make discovery until November 2005, and challenging Defendants' improper curtailment of a key deposition, risks pushing supplemental discovery well into January 2007. Thereafter (and as the Pueblo notified Defendants and this Court at the October 2005 Status Conference), the Pueblo will file an amended Complaint to reflect the fruits of discovery. Thus, it will likely be a few months before this Court resolves the class certification issue. The extended period that lies ahead before the underlying certification issues are resolved strongly augurs in favor of, not against, the interim appointment requested here and that is expressly authorized under Rule 23(g)(2)(A).

Third, Defendants' argue if the Court follows Rule 23(g)(2)(A) and appoints interim class counsel for the putative class—precisely as the Rule provides—putative class members will be misled, (Opp. at 6-9) and even “lulled into complacency” (*id.* at 8). This argument is hard to follow, for the whole point of the Rule is to facilitate appointment of class counsel precisely in the pre-certification setting. If the risk of misleading putative class members into believing that a class had actually been certified were a reason not to appoint, the pre-certification appointment Rule would be a nullity.

To make its case here Defendants remind the Court that in an Oklahoma case a similar class was sought by two other Tribal contractors but denied by the district court, conveniently omitting that the Supreme Court reversed the underlying case in *Cherokee Nation v. Leavitt*, 125 S. Ct. 1172 (2005)—along with much of the reasoning underlying that district court's decision (such as the district court's perceived significance of varying contract language and of the Judgment Fund Act, 31 U.S.C. § 1304.) The relevance of this point (and of Defendants' accompanying digression into why it will oppose certification when the time comes) is never made clear. In point of fact, however, it is not relevant at all, for no authority supports the notion that application of Rule 23(g)(2)(A) turns on the extent to which a defendant will oppose the underlying certification. (To the extent Defendants seek to paint a picture where no possible basis exists for even certifying a class, the better authority on point is not a district court decision from Oklahoma in a case the Supreme Court ultimately reversed, but this District's decision to certify a similar class 12 years ago in the *Ramah* litigation, *see Ramah Navajo Chapter v. Lujan*, No. 90-957 LH (Dkt. No. 95) (D. N.M. Oct. 1, 1993) (Mem. Op.), a class the Government has since voluntarily enlarged and to which it has paid two large multi-million

dollar settlements. But all that is for another day.)³

Finally, Defendants weakly invoke “adequacy considerations” as a reason against the appointment. Opp. at 9-10. Here, Defendants’ sole support is what this Court charitably called Mr. Gross’s recent “attack” upon Zuni counsel, *see* Memorandum Opinion and Order on Motions Relating to Intervention (Dkt. No. 145), at 10 n.7, as if the appointment of interim counsel is to be a popularity contest. Defendants’ reliance on Mr. Gross’s rejected “attack” is no more worthy of further response than the attack itself.

For the foregoing reasons and those set forth in the Pueblo’s opening memorandum, Plaintiff’s counsel Lloyd B. Miller respectfully moves this Court for an Order appointing Mr. Miller “interim counsel” for the putative class pursuant to Rule 23(g)(2)(A).

³ One of the more peculiar digressions is Defendants’ resurrection of 2002 correspondence in which Judge Hansen declined to approve the issuance of a notice to putative class members while the case was stayed. Opp at 8-9. What that action has to do with the Court’s authority now to make an appointment under Rule 23(g)(2)(A) is never explained. To suggest that an appointment order pre-certification will “jump the gun” on class certification (Opp. at 9) simply ignores the whole point of Rule 23(g)(2)—which, of course, only operates pre-certification. Following the Rules as they are written and meant to be applied hardly “jump[s] the gun.”

Respectfully submitted this 19th day of December 2005.

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/s/ Lloyd B. Miller

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December 2005, I sent by electronic mail, or caused to be sent by electronic mail, a true and correct copy of the **Reply Memorandum in Support of Motion of Plaintiff Pueblo of Zuni's Counsel Lloyd B. Miller for Appointment as Interim Class Counsel** to the following attorneys of record (or their co-counsel) for Defendants:

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