

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

PUEBLO of ZUNI,)	
)	
Plaintiff,)	
)	
v.)	No. CIV 01-1046 LH/LEG
)	
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’ REPLY TO PLAINTIFF’S OPPOSITION TO DEFENDANTS’
MOTION TO STAY BRIEFING ON CLASS CERTIFICATION AND TO STAY
DISCOVERY**

INTRODUCTION

Plaintiff’s Opposition to Defendants’ Motion to Stay Briefing on Class Certification and to Stay Discovery does little to rebut the compelling legal and practical reasons why Defendants’ Motion to Stay should be granted.¹ With more hyperbole than substance, Plaintiff’s Opposition makes the unfounded and unreasonable suggestion that, because the Supreme Court has rejected

¹ Defendants’ Motion to Stay Briefing on Class Certification and to Stay Discovery, filed March 25, 2005, is herein referred to as “Defendants’ Motion” or “Defs.’ Mot.” Plaintiff’s Opposition to Defendants’ Motion to Stay Briefing on Class Certification and to Stay Discovery, filed March 29, 2005, is herein referred to as “Plaintiff’s Opposition” or “Pl.’s Opp.”

one of Defendants' defenses related to the payment of indirect contract support costs ("CSC") under the Contract Dispute Act ("CDA") during fiscal years 1994-1997, Defendants cannot, and indeed should not, ensure that the payment of funds from Indian Health Service ("IHS") appropriations and the U.S. Treasury's Permanent Judgment Fund be made only to litigants to whom payments are actually owed under established contractual and other legal principles. The Opposition goes even further and twists the federal government's general trust responsibility to tribes in an attempt to have it inure to Zuni's specific benefit—regardless of the particular facts surrounding Zuni's various claims and notwithstanding that the expenditure of federal funds on non-meritorious claims would seriously deplete the limited funding available for the payment of meritorious claims as well as generally for the health care services that IHS provides.

Plaintiff essentially argues that the Court need not be bogged down with actually determining whether Zuni has a bona fide claim; in its view, the case is ready for judgment (or settlement) regardless of the fact that Defendants have not even filed their initial response to the First Amended Complaint. It is Defendants' (and the Court's) responsibility, however, to ensure that federal funds are distributed only to those claimants whom, based on the facts and the law, are legally entitled to such payments. Although one threshold issue pertaining to that entitlement has now been decided conclusively, the matter does not simply end there. Defendants and the Court are entitled to a full investigation and briefing in this case as a prerequisite to determining what sums, if any, are due to Zuni. In summary, Defendants' Motion has not, as Plaintiff claims, been interposed to delay disposition of this matter but, rather, to facilitate an orderly, fair, and

informed adjudication of the issues before the Court.

An additional development in this case also supports Defendants' approach. Michael Gross, Esq., counsel for Tunica-Biloxi et al. v. United States et al., No. 02-2413 (D.D.C.) (case described in Defendants' Motion at 4), has filed a motion to transfer for pretrial proceedings the Tunica matter to this district under 28 U.S.C. § 1407, the multidistrict litigation ("MDL") statute, and to consolidate Tunica with this case and another case in this district. Defendants plan to oppose the motion, but may seek, in the alternative, that the MDL panel consolidate the cases in the District of Columbia due to the procedural postures of the two cases as well as the experience of the judge in D.C. with respect to the issues that we expect will be addressed in this case. Thus, the forum in which this matter will be litigated, at least for pre-trial purposes, has not yet been determined.

ARGUMENT

I. DEFENDANTS' MOTION TO STAY SHOULD BE GRANTED TO CONSERVE THE RESOURCES OF THE COURT AND THE PARTIES.

A. Plaintiff Has Failed to Show Why Defendants Should Not Have 45 Days to Answer or Otherwise Respond to the First Amended Complaint.

As explained in Defendants' Motion, the Supreme Court has held, in no uncertain terms, that a court must first assess its own jurisdiction to decide a case and that without jurisdiction, a court has no power to act other than to so state and dismiss the case. (Defs.' Mot. at 7-8, citing, inter alia, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95 (1998).) In addition to the Supreme Court's explicit directive in Steel, the practical reasons set forth in Defendants' Motion

as to why the case should be stayed pending jurisdictional briefing, e.g., (1) to conserve the resources of the parties and the Court by avoiding unnecessary merits discovery and class certification briefing or rebriefing and by not requiring the Court prematurely to resolve any number of issues that might be moot upon dismissal of some or all of the claims for lack of jurisdiction, and (2) to avoid binding unnamed class members to decisions that should rightly apply just to Zuni, were not refuted in Plaintiff's Opposition, most likely because Plaintiff simply has no meaningful response.

The benefit of the orderly resolution of the issues as proposed by Defendants was demonstrated in the Tunica-Biloxi Tribe case cited in Defendants' Motion. In Tunica, Judge Walton properly recognized that the claims of the IHS contractor-plaintiffs were individualized in nature and that some were in fact jurisdictionally invalid. See Tunica-Biloxi Tribe, No. 02-2413, slip. op. at 8-16 (D.D.C. 2003) (attached as Tab B to Defs.' Mot.) As a result, even the Tunica plaintiffs saved the time and money of having to litigate defective claims. For example, one of the plaintiffs in that case (who seeks to be a class representative) originally challenged indirect CSC payments for all fiscal years prior to 2001. The Court, however, dismissed all fiscal year claims brought by that plaintiff for underpayment of indirect CSC except those related to fiscal years 1995 and 1996, primarily on the basis that the dismissed years did not satisfy the jurisdictional prerequisites of the Contract Disputes Act. See id. at 13-14. By resolving this issue at the outset, the Court saved that plaintiff from answering discovery related to other years for which the Court had no jurisdiction and from briefing issues related to years other than those

that were actually “live.”

Defendants also do not contest the fact, pointed out by Plaintiff, that jurisdiction is often raised at the summary judgment stage or even on appeal; it can be raised at any time.

Defendants’ point is more basic: Article III federal courts lack authority to resolve issues in matters over which they lack jurisdiction and, on a practical level, early resolution of jurisdictional issues avoids the unnecessary use of time and resources of the parties and the judicial system.

1. Plaintiff’s argument that other CSC litigation effectively prevents Defendants from raising jurisdictional defenses at the outset of this case is meritless.

Plaintiff does not even attempt to rebut any of Defendants’ legal or practical arguments, but instead argues that various other CSC litigation brought against both the IHS and the Bureau of Indian Affairs (“BIA”) should preclude Defendants in this case from investigating, briefing, and litigating jurisdictional and other contractual defenses in an orderly manner. Plaintiff is simply wrong. As Defendants stated in their Motion, they have no intention of relitigating Cherokee Nation et al. v. Leavitt et al., 125 S. Ct. 1172 (2005), here. Nonetheless, the decision in Cherokee Nation has no bearing on the various jurisdictional issues raised by the First Amended Complaint that Defendants identified in their Motion, a fact that Plaintiff does not contest.

It also bears emphasizing that, after the decision in Cherokee Nation, what remains to be decided are highly individualized claims for CSC. The import of the Supreme Court’s decision

is that it rejected a common defense raised by IHS for the underpayment of indirect CSC in years in which Congress did not cap IHS's CSC appropriation. In other words, Cherokee Nation eliminated a legal defense, raised by IHS against most of its contractors in the relevant years, that at one time may have made IHS contractors similarly situated. Now that the Supreme Court has rejected this particular defense, what is left are primarily individualized defenses specific to each IHS contractors' ISDA contract and related documents and to individual tribal contractors' course of conduct in pursuing their demands for additional CSC.

This post-Cherokee Nation reality weighs in favor of reviewing the specifics of Zuni's claims now to assess whether it has even satisfied the minimal threshold of bringing claims as to which the Court has jurisdiction. This new reality also merits against certification of a class of individual IHS contractors, all of whom, like Zuni, have individualized claims subject to different jurisdictional and contractual defenses.

Plaintiff next points to a case brought in 1990 against BIA. See Ramah Navajo Chapter et al. v. Norton, No. 90-957 (D.N.M.). As Zuni explains, the Ramah plaintiffs originally challenged the methodology used by the National Business Center (and its predecessor, the Office of the Inspector General) of the U.S. Department of Interior to calculate indirect cost rates for BIA contractors. In 1997, this methodology was held invalid by the Tenth Circuit. See Ramah Navajo Chapter v. Lujan, 112 F.3d 1455 (10th Cir. 1997). In light of the Tenth Circuit's decision, the Ramah parties entered into settlement negotiations upon remand in an attempt to resolve their claim as it applied to BIA contractors only.

What Zuni fails to explain is that shortly after this decision, Congress clarified any ambiguity that the Tenth Circuit had found in the ISDA by amending the ISDA to direct that IHS can only expend its annual appropriations for CSC that are directly attributable to IHS contracts. See 25 U.S.C. § 450j-2. In light of Congress's clarification, the Tenth Circuit's decision has little bearing on Zuni's claim.

In sum, neither Cherokee Nation nor Ramah addresses or resolves any of the jurisdictional issues that Defendants have identified, and neither "conclusively establish" Defendants' liability.

2. Plaintiff has not disputed the validity of the jurisdictional issues raised by Defendants' Motion.

In Defendants' Motion, filed a mere seven calendar days after the stay was lifted and after several days of attempted negotiation with Plaintiff, Defendants have made a good faith showing of possible claims for which this Court may not have subject matter jurisdiction. (Defs.' Mot. at 10-11.) These defects are specific to Zuni and, if established, would make their claims subject to dismissal. Without any case citations, however, Zuni attempts to argue that these issues go not to jurisdiction but to the adequacy of its representation. (Pl.'s Opp. at 11.) While it is true that there is an inter-relationship between the Court's jurisdiction over some or all of Zuni's claims and whether Zuni is, in fact, an adequate representative of a class, there is no question that the former issue is a threshold one that must be decided first. This being the case, it is a wasteful exercise to brief and decide class certification, only to find that the same issues that make Zuni an inadequate representative also deprive this Court of subject matter jurisdiction.

The fact that IHS has litigated other similar cases (Pl.'s Opp. at 6), also does not logically have any bearing on the investigation and litigation of facts specific to Plaintiff. To IHS's knowledge, Zuni has not brought another similar federal court action such that the Department of Justice should be aware of the specifics of Zuni's contractual claims. In addition, the fact that Defendants began to review Zuni's claims in 2001, (Pl.'s Opp. at 4-5), also does not bear on whether Defendants should have 45 days to file a motion to dismiss or an answer. The case has been stayed since 2001 and was not actively investigated during this time. In addition, there have been many changes to the legal landscape since the stay was entered. Defendants must have an opportunity to review the applicable case law, investigate the pertinent facts, and present the Court with a thorough and careful motion to dismiss. Forty-five days to do so is reasonable and will not prejudice Plaintiff in any meaningful way.

B. Plaintiff Has Not Shown Why Class Certification and Merits Briefing Should Not Be Stayed.

In their Motion, Defendants suggest an orderly and reasonable procedure for managing the case. First, the parties and the Court should litigate and resolve jurisdictional matters, they should next determine if the case will proceed as a class action, and then they should address the merits of the case. This procedure is entirely consistent with the case law and the Federal Rules and is not in any way unreasonable. It is, in fact, the procedure deemed appropriate by another district court judge reviewing similar individualized claims brought by other IHS contractors. See Tunica-Biloxi Tribe et al. v. United States et al., No. 02-2413, slip. op. at 1-2 (D.D.C. 2003) (attached as Tab A to Defs.' Mot.)

Defendants also explained in their Motion why they may need class certification discovery and why staying class certification until jurisdictional issues are resolved is beneficial to the Court and the parties. (Defs.' Mot. at 12.) Plaintiff responds that Defendants have already obtained discovery in other cases. (Pl.'s Opp. at 12-13.) This is a non sequitur. Zuni itself has never been tested to determine whether it satisfies the prerequisites of Rule 23, and thus discovery of other plaintiffs is not helpful. Zuni also points to the fact that there has been discovery in the Tunica case. The limited jurisdictional discovery in Tunica, however, was permitted at the request of the plaintiffs and was almost entirely one-sided. Finally, Plaintiff barely mentions that the only other court to review the appropriateness of certifying a class of IHS contractors ruled against certifying a class. See Cherokee Nation v. United States, 199 F.R.D. 357, 366 (E.D. Okla. 2001). At the very least, this decision militates in favor of a careful and thorough review of Plaintiff's Motion for Class Certification.²

C. Plaintiff's Self-Serving Request that the Court Direct Settlement Negotiations Is Inappropriate Or, At the Very Least, Premature.

Defendants are committed to considering the settlement of any meritorious claims. They will also carefully review any other settlement offers made by Zuni. It is, however, entirely unfair to expect that Defendants should enter into a global settlement agreement with Plaintiff, or a class of plaintiffs, without reviewing the legal merits of Plaintiff's, or any other contractor's

² Plaintiff makes the surprising, and unfounded, suggestion that it wants class certification discovery. This is notwithstanding the fact that it has already filed a Motion for Class Certification, which in effect asserts to the Court and Defendant that it has sufficient evidence to satisfy the requirements of Rule 23. Under these circumstances, the movant is not entitled to any class discovery.

case. Such a review cannot be done overnight. Moreover, it would be entirely irresponsible for Defendants to ignore the specific jurisdictional requirements of the Contract Disputes Act, which apply to every ISDA contractor that wishes to bring a claim for breach of contract. Because any funds used in a settlement will ultimately deplete the amount of funds that are available to IHS for providing or paying for health care services to all other Indian tribes, IHS has a duty to ensure that only those claimants with jurisdictionally proper and otherwise meritorious claims be paid.

Finally, unnecessarily expediting this case will be entirely unproductive to Plaintiff's desire to settle its claims, as Defendants will constantly be pressed by the litigation schedule proposed by Plaintiff. If anything, Plaintiff's stated goal is better served by entry of Defendants' proposed order.

CONCLUSION

For the foregoing reasons and those set forth in Defendants' Motion to Stay Briefing on Class Certification and to Stay Discovery, Defendants' Motion should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2005, I sent, via electronic and first class mail, postage pre-paid, a copy of Defendants' Reply to Plaintiff's Opposition to Defendants' Motion to Stay Briefing on Class Certification and to Stay Discovery, addressed to:

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