

IN THE UNITED STATES DISTRICT COURT
OF THE DISTRICT OF COLUMBIA

THE NEZ PERCE TRIBE, <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 06cv02239-JR
)	
DIRK KEMPTHORNE,)	
Secretary of the Interior, <u>et al.</u> ,)	
)	
Defendants.)	
_____)	

**DEFENDANTS’ RESPONSE REGARDING NOTICE
TO THE PUTATIVE CLASS AND PERMISSIVE JOINDER**

On August 8, 2008, Plaintiffs filed their Motion for Leave for Plaintiffs’ Counsel To Send Court-Approved Notice To Members Of The Putative Class (“Plaintiffs’ Motion”) (Dkt. 73). On August 22, 2008, Defendants moved for an extension of time to oppose or otherwise respond to Plaintiffs’ Motion (Dkt. 74). On August 26, 2008, the Court issued an Order (Dkt. 75) granting Defendants’ motion for an extension of time to and including September 9, 2008. The Order further stated that “counsel should take notice that the Court expects to approve the idea of sending notice and focus their response on what the notice should say.”

In light of the Court’s August 26, 2008 Order, counsel for Plaintiffs and Defendants held several discussions and were able to agree on the form and content of a proposed notice to the putative class, but could not reach agreement on Plaintiffs’ request that the Court refrain from ruling on Plaintiffs’ class certification motion until sixty days after distribution of the proposed notice. The parties submitted the proposed notice on September 9, 2008. That same day, Defendants moved for an extension of time to brief the disputed issue.

In short, Defendants submit that this Court should decide the class certification motion in the ordinary course of judicial process and should not expressly state in the notice or elsewhere a specific period of withholding of its decision on the class certification motion.

I. PLAINTIFFS' REQUEST TO WITHHOLD THE COURT'S RULING ON THE CLASS CERTIFICATION MOTION HAS THE EFFECT OF EXTENDING THE STATUTE OF LIMITATIONS

“It is well-settled that ‘the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.’” *Howard v. Gutierrez*, 474 F. Supp.2d 41, 52 (D.D.C. 2007) citing *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353-54, 103 S. Ct. 2392, 76 L. Ed. 2d 628 (1983) (hereinafter “*Crown Cork*”) (quoting *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974) (hereinafter “*American Pipe*”). In *American Pipe* and *Crown Cork*, the Supreme Court ruled that the filing of a class action tolls the statute of limitations for all purported class members beginning at the time the class action is filed. *See In re Fed. Nat'l Mortgage Ass'n Securities, Derivative, and "ERISA" Litig.*, 503 F. Supp.2d 25, fn. 7 (D.D.C. 2007). The statute of limitations remains tolled until the question of certification has been fully resolved. *See* 5 Moore's Federal Practice § 23.65[1][a] (Matthew Bender 3d Ed.) (citations omitted). If certification is denied, the period begins to run again. *Id.*

Plaintiffs' request the Court not to rule on their class certification motion until sixty (60) days after Plaintiffs circulate their Proposed Notice, *see, e.g.*, Pls. Brief at 1, 13, 14, but they do not provide any legal support for the requested delay. In effect, Plaintiffs are asking this Court to by-pass the limitations period adopted by Congress and extend the class certification tolling period through non-action.¹ *See* 28 U.S.C. § 2401(a); *see also* Public Laws 107-153 and 109-

¹ Defendants note that there is no direct statute of limitations question currently pending before the Court. Defendants reserve all rights and defenses with respect to any statute of limitations issues that may arise (including

158 (stating that “for purposes of determining the date on which an Indian tribe received a reconciliation report for purposes of applying a statute of limitations, any such report provided to or received by an Indian tribe . . . shall be deemed to have been received by the Indian tribe on December 31, 2000.”). While the Court has broad discretion in certifying a class or permitting joinder, Plaintiffs have not pointed to any legal authority that would make it appropriate for the Court to expressly hold its decision regarding Plaintiffs’ own class certification motion contrary to the congressional purpose embodied in Section 2401 and Public Laws 107-153 and 109-158. In fact, the running of the statute of limitations is not a factor in the Court’s analysis of class certification, and should not be a factor here. Notably, as conceded by Plaintiffs’ counsel, “[a]nd I know that when Your Honor considers class certification, the statute of limitations factor is not supposed to mix in on the merits . . .” Dkt. 72 at 85. Moreover, Justice Powell has directly cautioned against enlarging the tolling principles of *American Pipe*. See *Crown Cork*, 462 U.S. at 354 (Powell, J. concurring) (“The tolling rule of *American Pipe* is a generous one, inviting abuse.”).

II. THE PUTATIVE CLASS MEMBERS WILL NOT BE PREJUDICED BY THE ABSENCE OF AN EXPRESS WITHHOLDING OF DECISION

Importantly, allowing the ordinary course of judicial process to occur and excluding the Plaintiffs’ proposed delay of routine proceedings on a motion already briefed and argued will not cause any prejudice to the putative class members or Plaintiffs. First, the putative class members have already had the benefit of the potential statute of limitations period and the additional tolling period in order to determine their course of action. See, e.g., *American Pipe*, 414 U.S. 538 (1974); *Crown Cork*, 462 U.S. 345 (1983). As discussed in Defs. Opp. to Plfs. Class

the right to affirmatively move for relief under any applicable statute of limitations) in this action, including, but not limited to, all rights and defenses to any actions or other process that may be filed in the future on behalf any putative class member.

Certification Motion at 7, Tribes received the Arthur Andersen/Tribal Reconciliation reports twelve years ago.

Second, there has been no allegation or any indication that any putative class member refrained from filing suit by December 31, 2006 due to the pendency of this case or that any putative class member was going to file their own action by December 31, 2006, but for the tolling period. Indeed, nearly twenty (20) months have elapsed since the filing of Plaintiffs' complaint and no party has sought to join or otherwise intervene in this action. To the contrary, as Defendants showed in its brief opposing Plaintiffs' class certification motion, at least four Tribes have expressly rejected Plaintiffs' representation, and a group representing dozens of Tribes sent a letter to Plaintiffs' counsel stating that class certification is not the proper vehicle for resolving their claims. *See* Defs' Opposition to Plfs' Mot. for Class Action Certification and for Approval of Class Notice at 12. Along the same lines, there has been no ruling on class certification yet, and the putative class members are (and have been) free to proceed in any manner they see fit. Third, Plaintiffs could have contacted (and still can contact) the putative class members without Court approval at any time (as they could have even prior to filing their certification motion and/or immediately after the July 24th hearing). Finally, Plaintiffs admit through their own website (www.tribaltrust.com), presentations at conferences, Indian organizations, and media outlets, that the status of this case has been transmitted and publicized to the putative members. *See* Pls. Brief at pg. 11-12. Accordingly, the putative class members could have (and likely have) easily kept abreast of these proceedings and taken measures they deemed appropriate to protect their own interests. *See* Defendants' Opposition To Class Certification at pgs. 20-21 (setting forth available options to the putative class members for bringing suit).

Moreover, the proposed notice jointly negotiated by the parties quite clearly twice states that the Court could rule “at any time” and further that “you may have to act quickly.” Notice to Putative Class Members at 2. Those statements suffice more than adequately to alert putative class members to act expeditiously to determine how to respond to the notice.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court’s Order on Plaintiffs’ Motion for Leave not include a statement that the Court will refrain from deciding the pending class certification motion for sixty days.

Respectfully submitted this 16th day of September, 2008,

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