IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:96cv01285(TFH)
	)	
KEN SALAZAR, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' RESPONSE TO THE NATIVE AMERICAN RIGHTS FUND'S MOTION FOR INTERVENTION

The Native American Rights Fund (NARF) has moved to intervene [Dkt. No. 3714] and be heard on its petition for attorney fees and costs, which NARF attached to its motion [Dkt. No. 3714-1]. NARF contends it is eligible to intervene both as of right pursuant to Federal Rule of Civil Procedure 24(a)(2), and on a permissive basis under Rule 24(b). NARF Mem. at 5. NARF also requests expedited briefing. Although intervention as of right is not proper for the fee claim NARF seeks to pursue, defendants do not oppose NARF's intervention on a permissive basis to enable the Court to address all claims for attorney fees, expenses, and costs at one time.

Both the Settlement Agreement and controlling law preclude NARF from claiming a separate, individual share of any settlement funds payable to the classes. NARF's underlying petition, therefore, asserts a claim that is indirectly related to the settlement of this case, one that derives from plaintiffs' own petition for fees, expenses, and costs, which was filed in January and already fully briefed by the parties. NARF's petition stands in the same position as the motion filed by Mark Kester Brown [Dkt. No. 3699], another attorney who also previously worked on plaintiffs' case. Like Brown, NARF's request for an award of fees is not a fee petition itself but

a request to resolve an intramural dispute among plaintiffs' attorneys over the *division* of the fees that the Court will eventually award to counsel.

Although NARF's claim is derivative and not directly related to the settlement now before the Court, the Court has expressed interest in considering Brown's fee request, and it is in the interests of the parties, the classes, and judicial economy to resolve all questions over the division of a fee award at one time. Because the matter of attorney fees will not be heard until the final approval hearing, which is more than two months away, on June 20, 2011, no need exists for expedited briefing on NARF's fee petition.

I. Attorney Fee Award Claims Are Not a Proper Basis for Intervention as a Matter of Right Under Federal Rule of Civil Procedure 24(a)(2)

Defendants do not disagree with NARF's sentiment that "[t]he most sensible, practical and just solution is for the Court to allow NARF to assert its claim for fees and costs right now as part of this action." NARF Mem. at 27. If the Court is to allow intervention, however, it should apply a rationale supported by precedent. In this situation, the weight of authority holds that NARF is *not* eligible for intervention as a matter of right under Rule 24(a)(2). NARF contends that Rule 24(a)(2) confers intervention as of right because its "request for an $8.1 million share of any attorneys' fees award is . . . a fundamental subject of this action." *Id.* at 26. NARF relies exclusively on *Cherokee Nation of Oklahoma v. United States,* 69 Fed. Cl. 148 (Fed. Cl. 2005), but as demonstrated below, that Court of Federal Claims decision is readily distinguishable from the circumstances at bar. More important, NARF ignores persuasive authority from this district and elsewhere that eschews use of Rule 24(a)(2) in cases in which an attorney-intervenor seeks a share of a fee award payable to counsel of record. The majority view in those cases is decidedly

contrary to NARF's contention, for it strongly and persuasively holds that intervention via Rule 24(a)(2) is not – and should not be – available to former counsel seeking to recover part of a fee award.

Intervention as of right obtains "if the party seeking intervention 'claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.'" *Karsner v. Lothian,* 532 F.3d 876, 885 (D.C. Cir. 2008). This Circuit recognizes four prerequisites to intervene as of right: "(1) the application to intervene must be timely; (2) the applicant must demonstrate a legally protected interest in the action; (3) the action must threaten to impair that interest; and (4) no party to the action can be an adequate representative of the applicant's interests." *SEC v. Prudential Sec. Inc.,* 136 F.3d 153, 156 (D.C. Cir.1998).

Authority in this district holds that former counsel seeking to intervene in a client's case to protect a fee interest does not satisfy these criteria, even if the application to intervene is timely.[1] The most instructive case is *Alex v. Watt,* 38 Fed. R. Serv. 2d 1281 (D.D.C. 1984) (Dwyer, M.J.), which is directly on point. In that employment discrimination case, the plaintiff discharged her counsel, Bennett, after the suit was resolved in plaintiff's favor, but before the attorney fee issue had been litigated. Bennett moved to intervene as of right. As NARF contends

[1] Upon the specific facts NARF asserts in its motion, defendants do not contest the timeliness of its intervention request but do assert that the underlying fee petition is tardy to the extent it would purport to stand as an independent claim for a further award of fees, expenses, and costs from settlement funds.

here, Bennett asserted that he had a direct interest in the case because he had not been fully compensated for all the professional time he had devoted to the suit. The court disagreed.

"At first blush," the court opined, it might appear that Bennett "satisfies these criteria" for intervention as of right, but "upon further consideration we are persuaded that he has not. . . ." *Id.* at 1282. The court held that the "interest" at stake under Rule 24(a)(2) must be "direct, substantial and significantly protectable" and concluded that Bennett's interest "in this case is indirect." *Id.* His attorney fees claim "is a derivative interest," because the former counsel "has no claim to the fee award independent of plaintiff." *Id.* at 1283. As in this case, the intervention question in *Alex* arose when the parties were attempting to reach a settlement on the amount of the fee award. As here, the former counsel also "has a contract with the plaintiff." *Id.* On these facts, the court concluded that although "Mr. Bennett has an interest in being paid a reasonable fee for his services[,] [w]e fail to see why he needs to intervene in the present action to protect his interest." *Id.*

Although *Alex* involved a statutory fee award, rather than the common fund award at issue here, the distinction is without difference. NARF essentially concedes that both the Settlement Agreement and controlling law bar it from pursuing an additional fee award, at least under the Equal Access to Justice Act. NARF Mem. at 18. The hard-fought bargain comprising the Settlement Agreement prohibits any award of fees, expenses, or costs to counsel other than through the petition plaintiffs filed in January. See Plaintiffs' Petition for Class Counsel Fees, Expenses and Costs Through Settlement (Jan. 25, 2011) [Dkt. 3678]. In Defendants' Response and Objections to Plaintiffs' Petition for Class Counsel Fees, Expenses and Costs Through Settlement (Feb. 24, 2011) [Dkt. 3694], which defendants incorporate by reference, the

government has demonstrated that a single award of attorney fees, costs, and expenses of $50 million would be ample consideration, would comply with both controlling law and the Settlement Agreement, and would be fair and reasonable to class members. NARF's intervention would not and cannot alter that conclusion.

Indeed, NARF admits that it desires only to assert a claim that is derivative to plaintiffs' own petition. NARF declares that "[i]f the Court allows NARF to intervene and awards NARF $8.1 million, the *only* people adversely affected would be the other lawyers seeking a fees [sic] award." NARF Mem. at 22 n.68 (emphasis added). That assertion can only be true if NARF's claim is derivative. The district court, in *Laker Airways Ltd., v. Pan American Airways,* 109 F.R.D. 541 (D.D.C. 1985), held such an indirect interest to be insufficient to support intervention as of right. In *Laker,* a former partner of plaintiffs' law firm moved to intervene in the client's case in order to preserve his right to a share of the attorney fees award. The former law partner had "stated in his papers again and again that he 'does not seek in this motion to increase whatever amount of compensation was agreed' in the Laker settlement with respect to attorney's fees." *Id.* at 544. Recognizing that "his quarrel is solely with his former partners with regard to the division of the attorneys' fees which will be paid pursuant to the settlement," the court concluded that his limited interest in the fee award undermined his argument for intervention as of right. *Id.*

Courts in other circuits have perceived a danger inherent to granting intervention "as of right" to former counsel under Rule 24(a)(2). The Second Circuit avoided deciding the issue under Rule 24(a) in *Butler, Fitzgerald & Potter v. Sequa Corp.,* 250 F.3d 171 (2d Cir. 2001), but it cautioned that "[d]istinct from the question of whether a charging lien falls within the language

of Rule 24 are the public policy repercussions that arise when discharged counsel is permitted to intervene as of right in his former client's action to protect an interest in legal fees." *Id.* at 178. One risk was that "an intervenor-counsel might advance arguments either not raised, or even in conflict with those already made, unintentionally undermining the current trial strategy of his former client." *Id.* Another concern was that the cost-benefit analyses of the client and former counsel might diverge: "[w]hile the law firm's sole interest is generally in a financial recovery . . ., the decision-making of the former client may incorporate other factors." *Id.* at 179. Other courts have expressed similar concern. *See, e.g., Gov't of Virgin Islands v. Lansdale,* Nos. 2001-157, 1998-243, 1992-79, 2010 WL 2991053 (D.V.I. July 26, 2010) (acknowledging doubts and ruling on other grounds); *Alam v. Mae*, No. H-02-4478, 2007 WL 4411544, at *4 n.3 (S.D. Tex. Dec. 17, 2007) (citing *Butler*); *Newman v. Mutual Life Ins. Co. of New York,* 206 F.R.D. 410, 411 (D. Md. 2001) (finding "the policy concerns expressed in *Butler* particularly compelling").[2]

NARF's reliance on the Court of Federal Claims decision in *Cherokee Nation* is misplaced and does not require a different conclusion. That case involves an issue not present here: a risk that entry of a consent decree in *Cherokee Nation* could determine whether the attorney fees would be payable at all. Unlike the indirect interest NARF seeks to assert, the law

[2] Only the Fifth Circuit appears to have recognized a terminated attorney's ability to intervene as of right (at least when a lien exists). *See Gaines v. Dixie Carriers, Inc.,* 434 F.2d 52 (5th Cir.1970). But that decision has since been criticized – even by courts in the Fifth Circuit. *See Keith v. St. George Packing Co.,* 806 F.2d 525, 526 (5th Cir.1986) ("Although *Gaines* may not represent the most persuasive use of Fed. R. Civ. P. 24, it binds us as the law of this Circuit until modified en banc."); *see also Alam,* 2007 WL 4411544, at *4 (S.D. Tex. Dec. 17, 2007) (refusing to extend *Gaines,* noting that "on several occasions the Fifth Circuit has questioned the line of decisions" that allow intervention as of right by former counsel).

firm's interest in seeking intervention in *Cherokee Nation* "seem[ed] to be of a 'direct and immediate' character . . . [that] pursuit of its interest may be precluded by the entry of the consent decree." *Id.* at 156. No like concern exists here. The Court should not rely upon Rule 24(a)(2) to authorize intervention.[3]

II. NARF May Be Allowed Permissive Intervention Under Rule 24(b)

Although intervention as a matter of right is not available to NARF, it does appear that NARF has established eligibility for the Court to grant permissive intervention under Rule 24(b) for the purpose of determining how any award of fees, expenses, and costs should be divided among the attorneys who have worked on plaintiffs' behalf.[4] In its brief, NARF identifies the prerequisites for permissive intervention and makes a reasonable argument for granting such relief. NARF Mem. at 28-29. Defendants have no objection to intervention on this basis, so long as it is clear that NARF's claim does not stand as justification for awarding additional fees, expenses, or costs, but is limited to determining what (if any) amount NARF should receive from a *division* of whatever fees, expenses, and costs the Court finally awards to plaintiffs. Permissive intervention ultimately lies within the Court's sound discretion, but some judicial economy should be realized by resolving all outstanding fee disputes in one decision.

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[3] Alternatively, NARF has not demonstrated that current class counsel will not adequately protect NARF's interest. Because NARF's claim for a share of fees, expenses, and costs, depends in turn upon the success of plaintiffs' own petition, the interests of the lawyers are aligned in that respect, at least.

[4] As an example, the Ninth Circuit seems to favor permissive intervention under Rule 24(b) but not intervention as of right under Rule 24(a)(2) in these circumstances. *Compare Venegas v. Skaggs,* 867 F.2d 527, 531 (9th Cir. 1989) (under specific facts of case, district court abused its discretion in denying permissive intervention to attorney), *aff'd sub nom. Venegas v. Mitchell,* 495 U.S. 82 (1990), *with Stockton v. United States,* 493 F.2d 1021 (9th Cir. 1974) (intervention under 24(a)(2) by attorney was improper given facts of case).

III. Expedited Briefing Is Neither Appropriate Nor Necessary

To the extent NARF seeks expedited briefing on the merits of its petition for fees and costs, that request is without merit. Briefing on the instant motion to intervene will close by April 25, 2011. Unless the Court rules otherwise, Local Civil Rule 7(j) provides a 17-day response period to an intervenor's claim following the grant of intervention.[5] Applying this default rule means that even were the Court to require three weeks to decide the intervention question (and then grants it), the parties would complete their briefing on the merits of NARF's claim by June 13, 2011 – a full week ahead of the final approval hearing set for June 20, 2011. NARF's fee claim contains many documents and arguments that warrant the parties' careful consideration. The Court benefits from fully developed arguments by the parties, and a shorter briefing period will not aid that end. The Court should not expedite briefing on the merits.

CONCLUSION

For the foregoing reasons, the Court may grant NARF's motion to intervene on a permissive basis pursuant to Rule 24(b), and it should otherwise deny the motion.

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[5] Local Civil Rule 7(j) provides that motions to intervene "be accompanied by an original of the pleading [asserting]. . . the claim . . . for which intervention is sought." NARF has included its petition at the end of its motion for intervention. See Docket No. 3714 at 36 et seq. The same local rule further provides that the "pleading shall be deemed to have been filed and served by mail on the date on which the order granting the motion [to intervene] is entered." Local Civil Rule 7(j).

Dated: April 14, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on April 14, 2011 the foregoing *Defendants' Response to the Native American Rights Fund's Motion for Intervention* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile on:

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