UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

DONNA M. GILBERT, JULIE MOHNEY, CHARMAINE WHITE FACE, and others similarly situated, Plaintiffs, v. RADM MICHAEL D. WEAHKEE, Principal Deputy Director Indian Health Service (IHS), JAMES DRIVING HAWK, Great Plains IHS Area Director, WILLIAM BARR, United States Attorney General, Defendants.	5:19-CV-05045-JLV DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO CERTIFY CLASS ACTION AND BRIEF IN SUPPORT OF SAID MOTION

COME NOW the defendants and respond in opposition to the plaintiffs' motion to file a class action lawsuit, their subsequent list of 166 potential class members, and brief in support of their motion. Docs. 12, 12-1, 30, 35. Plaintiffs' motion should be denied because it does not cure the jurisdictional defects of Plaintiffs' underlying case and a class action is not proper or warranted on the merits in this case.

BACKGROUND FACTS AND PROCEDUREAL HISTORY

On September 27, 2018, the Great Plains Tribal Chairmen's Health Board ("GPTCHB") submitted a proposal to the IHS, on behalf of the Cheyenne River Sioux Tribe ("CRST"), Oglala Sioux Tribe ("OST"), and Rosebud Sioux

Tribe ("RST"), to assume the operations of and funding for the programs, functions, services, and activities ("PFSAs") of the IHS Service Unit in Rapid City, South Dakota ("RCSU") pursuant to the Indian Self-Determination and Education Assistance Act ("ISDEAA"). In late 2018, a complaint and motion for emergency relief was filed against the GPTCHB and the IHS by Charmaine White Face ("White Face"), one of the plaintiffs in the instant action, alleging basically the same violations of law and the same remedies as in the instant case. See White Face v. Church, et al., 5:18-cv-05087-JLV ("White Face (2018)") Doc. 1. Following a hearing on December 13, 2018, this Court dismissed White Face's complaint without prejudice holding that Plaintiff lacked subject matter jurisdiction to bring her claims, and entered judgment for the defendants. White Face (2018) Docs. 29, 30, 31. On December 18, 2018, the RST Tribal Council rescinded its two earlier resolutions providing for the assumption of health care, and the IHS officially declined the GPTCHB's proposal on December 21, 2018. Docs. 18-1 through 18-3.

On February 14, 2019, the GPTCHB made a new proposal to the IHS for the assumption of health care at the RCSU, on behalf of the CRST and the OST. Docs. 18-4 through 18-7. The assumption was partially awarded and partially declined on June 1, 2019. Docs. 18-9, 18-10. On July 21, 2019, the partial assumption became effective and the PFSAs are currently being operated at the RCSU by the GPTCHB to the CRST, OST, and unaffiliated tribal member beneficiaries, and by the IHS to the RST and unaffiliated tribal member beneficiaries. Docs. 18-8, ¶ 7 and 18-9 at 2.

The plaintiffs filed the instant lawsuit and amended complaint on June 28 and July 16, 2019, against the IHS and the United States Attorney General. Docs. 1, 5. The plaintiffs moved to certify a class action, with initial and subsequent consent forms totaling 167 individuals. Docs. 12, 12-1, 30. The defendants moved to dismiss this action based primarily on jurisdictional grounds, Docs. 16 through 18-13, 31, 32, 36, and the plaintiffs opposed dismissal including declarations from individuals allegedly impacted by the assumption contract. Docs. 19-29, 33, 33-1. The defendants moved to strike the plaintiff's request for a class action for lack of briefing, Doc. 34, and the plaintiffs responded by filing a brief in support of their motion on November 25, 2019. Doc. 35.

LEGAL ARGUMENT

I. PLAINTIFFS' ATTEMPTED CLASS ACTION DOES NOT CURE THE JURISDICTIONAL DEFECTS IN PLAINTIFFS' UNDERLYING CLAIMS

A class action brought on behalf of individual Rapid City community members does not cure the jurisdictional bars discussed in the defendants' briefing filed in support of their motion to dismiss. Docs. 16 through 18-13, 31, 32, 36. For all of the reasons previously stated, individual community members, whether it be three or three hundred, do not have standing to challenge the partial assumption of the PFSAs of the RCSU by the GPTCHB from the IHS, nor do they have the standing to assert employment claims on behalf of other individuals. Regardless of the number of individuals in the

class, the lawsuit must still be dismissed for failure to join indispensable parties as defendants, namely the GPTCHB and the CRST and OST.

Furthermore, no private right of action exists for individual community members, regardless of the number, to assert such a claim under the 1868 Treaty, or under the ISDEAA. 25 U.S.C. § 5321; Docs. 17 at 14-16, and 18-11. The individual community members are not a tribe, nor are they a tribal organization. Id. They are, presumably, all members of a tribe, and it is through their tribal governments that their interests must be advocated.

II. A CLASS ACTION IS NOT PROPER OR WARRANTED IN THIS CASE.

A class action is not proper or warranted in the instant case, under the Federal Rules of Civil Procedure or the case law. Under Rule 23, all four prerequisites in subpart (a) must be met, as well as at least one of the three factors set forth in subpart (b). Fed. R. Civ. P. 23; Orduno v. Pietrzak, 932 F.3d 710, 716 (8th Cir. 2019) (citing Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 460 (2013)).

Rule 23(a) reads as follows:

> [M]embers of a class may sue … as representative parties on behalf of all members only if:
> (1) the class is so numerous that joinder of all members is impracticable;
> (2) there are questions of law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; **and**
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a) (emphasis added).

Further, pursuant to Rule 23(b),

A class action may be maintained **if Rule 23(a) is satisfied and if**:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; **or**
(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; **or**

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;
(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
(D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b) (emphasis added).

In Orduno, the district court held that Orduno's proposed class failed to satisfy the numerosity requirement of Rule 23(a), and the predominance requirement of Rule 23(b)(3), the prong relied upon by Orduno. Orduno at 716. The Eighth Circuit concluded that the district court did not abuse its discretion

on the question of predominance, and that ground was sufficient to affirm the ruling. Id. "The predominance inquiry 'asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.' " Orduno at 716 (citing Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1045 (2016) (citation omitted)). "Where too many individual questions predominate over common ones, certification is inappropriate." Orduno at 716 (citing Webb v. Exxon Mobil Corp., 856 F.3d 1150, 1156-57 (8th Cir. 2017); Ebert v. Gen. Mills, Inc., 823 F.3d 472, 479-80 (8th Cir. 2016)). The issue of class certification has been raised numerous times in the District of South Dakota, each time turning on the facts and circumstances of each individual case. See Oglala Sioux Tribe v. Van Hunnik, 2014 WL 317693 (D. S.D., Jan. 28, 2014-JLV) (class granted to challenge policy regarding removal of Native American children from their homes; no individual claims); Cochrun v. Weber, 2013 WL 2634838 (D. S.D., June 11, 2013-KES) (class denied to inmate alleging specific instances of treatment not common to the class); Lambertz-Brinkman v. Reisch, 2009 WL 4774895 (D. S.D., Oct. 31, 2008-CBK) (class granted to challenge policy and practice regarding medical treatment at South Dakota Women's prison); Bird Hotel Corp. v. Super 8 Motels, Inc., 246 F.R.D. 603 (D. S.D., 2007-LLP)(class granted to challenge 5% fee contained in Franchise Agreement affecting all class members); City of Livonia Emp. Ret. Sys. v. Hanson, 238 F.R.D. 476 (D. S.D., 2006-LLP)(settlement class denied to shareholder seeking injunction to prevent board from blocking bids to

purchase corporation). When a class action was certified in the above actions, it was because the facts warranted certification, unlike in the instant case. In those cited cases, the implementation of a policy was in question and there were no uniquely individualized claims. See Oglala Sioux Tribe, 2014 WL 317693; Lambertz-Brinkman, 2009 WL 4774895; Bird Hotel Corp., 246 F.R.D. 603.

The only case cited by the plaintiffs in their brief in support of their motion to certify a class is Montgomery Ward & Co. v. Langer, 168 F.2d 182, 187 (8th Cir. 1948), which has little bearing on the instant case. Doc. 35 at 2. The defendants agree with the Eighth Circuit in Montgomery Ward & Co. regarding the availability of and necessity for class actions when the circumstances warrant. The defendants further agree that class actions are available to litigants when they can meet the criteria set out in Rule 23. However, in the instant case, the plaintiffs cannot show, even at a minimum, that they meet the four factors required in Rule 23(a), let alone one of the required three factors in Rule 23(b). Fed. R. Civ. P. 23.

A. Rule 23(a)

Despite the plaintiffs' minimal assertions, the potential class in this case is not so numerous that joinder of all members is impractical, there are not questions of law or fact common to the class, the claims of the three plaintiffs are not typical of those of the class, and the three plaintiffs will not fairly and adequately protect the interests of the class. Doc. 35 at 2-3; Fed. R. Civ. P.

23(a). As the above criteria tend to blend in this case, all four issues will be discussed together herein.

The plaintiffs assert that the numerosity requirement is met solely because the "list of patients who are eligible to receive health care from the government exceeds 23,000 in the Rapid City community." Doc. 35 at 2. The plaintiffs also argue that the legal and factual questions are common to the class because the tribal members residing in Rapid City and served by the Sioux San Hospital "are entitled to their treaty rights" and have the right to meaningful participation regarding their health services. Id. The plaintiffs further argue that typicality and protection of the class' interests exist because the plaintiffs share the concerns of the "vast majority of the native population in Rapid City" who oppose the assumption of the PFSAs of the RCSU by the GPTCHB, and they have explained and informed the community regarding the litigation. Id. at 2-3.

First, even if we agree that the Rapid City community utilizing the PFSAs at the RCSU totals 23,000 individuals, that is not the end of the inquiry regarding the numerosity of the class. The fact that some individual Rapid City community members oppose the assumption of the PFSAs of the RCSU by the GPTCHB, and the manner in which it was done, does not mean that all individuals within that community are in agreement. Even if the "vast majority" oppose the assumption, what about those in favor of it? Do the plaintiffs represent them? Would the proposed class represent their interests? The defendants submit that neither the plaintiffs, nor the proposed class,

would represent the interest of all the 23,000 individuals in the Rapid City service area.

Additionally, there are too many variables among the potential class members to find commonality of the class and typicality of the plaintiffs, the representative parties. Plaintiff Gilbert is a current employee of the IHS, Plaintiff Mohney is a former employee, and Plaintiff White Face, it is believed, has never been employed by IHS. See Docs. 1, 5, 20-21. Other potential class members are employees, while some are not. See Docs. 24-27. Some employees may have different issues than other employees. See Docs. 20, 21, 24-27. The employees may very well have different issues than the non-employees. Compare id. with Docs. 22, 23, 28, 29. Not all potential class members are in need of the same medical care and not all healthcare services were assumed by the GPTCHB. See Docs. 22, 23, 25, 26-1 at 13-16, 26-1 at 46-48, 26-1 at 49-51, 27, 28, 29. Each individual class members' substantive medical treatment is unique and would prevent issues in common. The receipt of the medical treatment also varies; those class members who are enrolled with the CRST or OST likely receive their services from the GPTCHB, and those enrolled with the RST, or whom are unaffiliated, likely continue to receive their services from the IHS – the very entity providing the services prior to the assumption. See Docs. 18-8; 25 and 26-1 at 13-16 (CRST), 26-1 at 46-48 (RST), 26-1 at 49-51 (OST), 27 (OST), 28 (RST?), 29 (RST). In fact, at least one member of the potential class submitting a declaration was a member of the RST and was pleased with the care provided by the IHS. See Doc. 29.

The infinite possibility of individual questions make it inappropriate for this Court to certify the members of the "Rapid City Indian Community" as a class in this case. Furthermore, those individuals already have representation through their respective tribal governments, who have the authority to make decisions on behalf of their tribal members. The appropriate forum for the relief they seek is through their tribal governments, not a class action lawsuit. Aside from the jurisdictional concerns of such an action under the ISDEAA, it would be nothing short of chaos to allow individual community members to challenge and undermine the actions of tribal governments in such a manner.

B. Rule 23(b)

In their brief, the plaintiffs fail to address Rule 23(b) altogether. Doc. 35. In their initial motion, they cite the first two factors but fail to provide support or argument as to why either factor exists, and they fail to address Rule 23(b)(3) at all. Doc. 12. In their motion, the plaintiffs cite verbatim Rule 23(b)(1) and indicate that the prong does not exist; the same position taken by the defendants herein. Doc. 12 at 2 ("Prosecuting separate actions by or against individual class members would **not** create a risk of [(A) or (B)] (emphasis in original).") The plaintiffs are correct -- separate actions by individual class members related to their employment or the individual provision of the PSFAs at the RCSU, would not establish incompatible standards of conduct by the defendants or be dispositive of the interests of the other members of the class or tribal members outside the class. In fact,

separate actions would be the only way to adjudicate the individual members' varied complaints raised in this case.

Regarding Rule 23(b)(2), that the defendants have acted or refused to act on grounds that apply generally to the class, the plaintiffs merely state that that provision is "(TRUE)" without making any argument as to how or why. Doc. 12 at 2. However, the information and facts filed by the plaintiffs show that the IHS has already acted differently to different class members. See Docs. 20-29. Additionally, some of the complaints of the proposed class are of actions taken by the GPTCHB, who is not a party to this action. Id. Moreover, and perhaps most importantly, as discussed above, even if the proposed class could be granted final injunctive relief based on its complaint, such relief would significantly adversely affect the employment and health care of other members of the Rapid City Indian Community not in favor of this litigation and not in a position to defend their concerns.

Likewise, the predominance inquiry of Rule 23(b)(3) is not met in this case because the non-common, aggregation-defeating, individual issues are more prevalent or important than the common, aggregation-enabling, issues. Orduno at 716 (citation omitted); Fed. R. Civ. P. 23(b)(3). In the instant case, too many individual questions predominate over common ones. Id. As discussed in Part A, *supra*, many individual questions exist within the proposed class, whether they are related to employment issues or medical care or the fulfillment of other PFSAs at the RCSU. Similarly, even though Plaintiff White Face claims to represent all people of the Great Sioux Nation, Doc. 19 at

11, she clearly would not have authority to represent the members of the numerous other tribes who are IHS beneficiaries living in the Rapid City service area. For those reasons, questions of law or fact common to class members in this case do not predominate over any questions affecting only individual members.

Therefore, for all of the above reasons, the plaintiffs cannot show that their proposed class meets the criteria required by Rule 23 of the Federal Rules of Civil Procedure. Therefore, if this Court finds jurisdiction in this case, the defendants request that the plaintiffs' motion for certification of a class action be denied.

CONCLUSION

Therefore, for all of the above reasons, should this Court find jurisdiction in this case, the plaintiffs' motion to file a class action should be denied.

Dated this 13th day of December, 2019.

RONALD A. PARSONS, JR.
United States Attorney

/s/ SaraBeth Donovan
SARABETH DONOVAN
Assistant U.S. Attorney
515 Ninth Street, Suite 201
Rapid City, SD 57701
Phone: 605-342-7822
Sarabeth.donovan2@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of December, 2019, I caused a copy of the foregoing defendants' brief in opposition to the plaintiffs' brief in support of their motion for class action to be served upon the following via email, and a copy of the same to be served on the 14th day of December, 2019, by U.S. Mail, postage prepaid to:

Patrick A. Lee, Esq.
203 E. Oakland Street
Rapid City, SD 57701
plee@olc.edu

/s/ SaraBeth Donovan
Assistant U.S. Attorney