UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

UNITED STATES OF AMERICA **PLAINTIFF**

VS. **CIVIL ACTION NO. 3:70CV04706-WHB-LRA**

STATE OF MISSISSIPPI
SIMPSON COUNTY SCHOOL DISTRICT, ET AL. **DEFENDANTS**

SUPPLEMENTAL BRIEF OF THE SIMPSON COUNTY SCHOOL DISTRICT ON ISSUES OF STANDING AND MOOTNESS

The Simpson County School District (the "District") submits this supplemental brief on issues of standing and mootness pursuant to the Court's Order of May 8, 2013 [Dkt. 87] and in reply to the Plaintiff-Intervenors Memorandum Brief [Dkt. 82].

The District does not contend this case is moot. The United States is the initial, primary plaintiff here and has been active in all stages of the litigation, diligently pursuing the interests of current African-American students by working toward the goal of unitary status with the District. The continuity of prosecution by the United States ensures the case can be properly resolved regardless of the status of the plaintiff-intervenors and the certified class they represent.

As already discussed at pp. 2-3 of its Brief [Dkt. 81], the District contends the plaintiff-intervenors' individual claims are moot and they have no standing because they have long since ceased to attend school in the District and have no stake in the outcome of the litigation. Further, the District contends the Court should dismiss the class certified by the Order of August 20, 1982 and the class representatives, i.e., plaintiff-intervenors, for failure of the class and its representatives to prosecute their claims and also their

failure to fulfill the requirements of Rule 23. Upon dismissal of the class, the case may move forward between the remaining named parties, the United States and the District.

Alternatively, the Court should prohibit additional discovery by the class at this late juncture in the case and promptly proceed with a fairness hearing after due public notice.

I. The Court has the discretion to dismiss both the class and the plaintiff-intervenors for failure to prosecute.

The Court has the authority to require a party to actively prosecute its case, and when a party fails to do so, the Court may order, *sua sponte*, involuntary dismissal for failure to prosecute. *Jones v. Caddo Parish School Board*, 704 F.2d 206, 214 (5th Cir. 1983) (dismissing "class" of black children and their parents for failure to prosecute school desegregation case; "class" was not certified but was treated as class) (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-33; *Rogers v. Kroger Co.*, 669 F.2d 317, 319-30 (5th Cir. 1982); *see* 9 C. Wright & A. Miller, *Federal Practice and Procedure; Civil* §§ 2369-70 (1971)). Certification of a class does not relieve a party of its duty to diligently prosecute and participate in the litigation. The Fifth Circuit has held that "[a]lthough infrequent, dismissals for failure to prosecute suits denominated as class actions are proper in the federal courts." *Jones v. Caddo Parish School Board*, 704 F.2d at 214 (citing *Partridge v. St. Louis Joint Stock Land Bank*, 130 F. 2d 281 (8th Cir. 1942); *National Hairdressers' & Cosmetologists' Ass'n v. Philad Co.*, 4 F.R.D 106 (D. Del. 1944)). Further, because dismissal is involuntary, the notice requirements of Rule 23(e) do not apply to dismissal of a class for failure to prosecute. *Id.* (citing 7A C. Wright & A. Miller, *Federal Practice and Procedure; Civil* § 1797 at 235.)

Additionally, the Court has the "power and authority to conduct a review of intervention status" because "intervention does not carry with it an absolute entitlement to continue as a party until termination of the suit." *Tasby v. Wright*, 109 F.R.D. 296, 298 (N.D. Tex. 1985) (plaintiff-intervenor NAACP was dismissed from school desegregation case for being inactive or "dormant") (citing *Morgan v. McDonough*, 726 F.2d 11, 14 (1st Cir. 1984)). In *Tasby*, the court found a three-year period of inactivity a "long period of

dormancy" and dismissed the intervenors from the desegregation case. *Id.* The "dormancy" and "failure to prosecute analyses" are similar, and both allow the Court to dismiss a party for remaining silent and inactive instead of pursuing its interests.

Here, plaintiff-intervenors were allowed to intervene and certified as a class in 1982, but class certification does not diminish their obligation to prosecute their interests. Class certification does not entitle either the class or its representatives to remain inactive or dormant, especially while the United States and the District worked toward a resolution of the issues, and then suddenly -- and tardily – with no demonstration of good cause, reinsert themselves into the case once unitary status is imminent. Plaintiff-intervenors and the class have been dormant for almost eight years, failing to prosecute their claims and not participating in the litigation. They submitted no response to the District's 2007 renewed motion for unitary status. They did not participate in preparing the current consent decree and raised no objection to its entry. To the District's knowledge, they have not participated with the United States in evaluating any of the employment information the District provided to the United States in compliance with the most recent Order of this Court or in evaluating the District's reports to the Court.

Plaintiff-intervenors argue that they have the right to enforce the 1983 Consent Decree because they are signatories. Memorandum Brief on Standing and Mootness, p. 5 [Dkt. 82]. But they ignore the fact that a new Consent Decree [Dkt. 28] was entered in 2011, during their long period of inactivity in the case, which they chose not to sign, and which has displaced the 1983 Decree. The 2011 Consent Decree expressly provides that "[c]ontinued judicial supervision of this case will be limited to ensuring that the District takes all actions identified in this Consent Decree," and "sets forth in detail the areas to be addressed and the action to be undertaken by the District," and is a "roadmap to the end of judicial supervision" of the District. [Dkt. 28, p. 10]

The Fifth Circuit has held that dismissing a plaintiff class in a school desegregation case does not raise the concern that the interests of the class may be overlooked when the United States is present as a

party plaintiff to actively represent those interests. *Jones v. Caddo Parish School Board*, 704 F.2d at 215. Here, the United States initially filed the desegregation action, and the Court has always considered the United States to be the lead plaintiff. In fact, when it granted intervention, this Court cautioned that the United States would remain the active lead plaintiff [Dkt. 14, p. 55-56]. Applying the reasoning in *Jones v. Caddo Parish*, it follows that, "even a complete and final dismissal of all private plaintiffs would not mean that school desegregation would no longer be pursued." *Jones v. Caddo Parish School Board*, 704 F.2d at 215.

II. The class and its representatives have failed to fulfill the requirements of Rule 23/

A class must also fulfill the requirements of Rule 23 throughout the entire action. *Id.* One of the fundamental requirements of Rule 23 is that the named class representatives must "fairly and adequately protect the interest of the class." Fed. R. Civ. P. 23(a)(4).

A. The plaintiff-intervenors as class representatives have failed to adequately represent the class.

The issue of adequacy of representation may be raised by the Court or by a party at any time during the litigation, and the determination of adequacy of representation is based upon the facts and circumstances of each case. *McGowan v. Faulkner Concrete Pipe Co.*, 659 F.2d 554 (5th Cir. 1981); Fed. R. Civ. P. 23 (d)(1)(C). When faced by inadequate class representation, the Court has several options. It may decertify the class and allow the suit to move forward as between the named parties, or it may allow members of the class to intervene under Rule 24 as new class representatives. *Tate v. Hartsville/Trousdale County*, 2010 WL 4822270 (M.D. Tenn. Nov. 22, 2010); *Eckert v. Equitable Life Assurance Society of U.S.*, 227 F.R.D 60 (2005); *Goodman v. City of Dallas*, 73 F.R.D. 642 (N.D. Tex 1977); Fed. R. Civ. P. 23(d)(1)(C),(D).

Here, the named class representatives have graduated from the District's schools, and they no longer have any live stake in the desegregation action. Their personal claims are moot, and they have no

standing. They have not participated in any meaningful way for the last eight years in the litigation. Further, no other member of the class has attempted to intervene to provide adequate representation. Nor has class counsel attempted to maintain the adequacy of representation by urging the named representatives to participate or locating new representatives to intervene. For eight years, representation as been completely absent, much less inadequate

The plaintiff-intervenors strain to compare themselves to the "Joshua Intervenors" in *Little Rock School District v. State of Arkansas, et al.* 664 F.3d 738 (8th Cir. 2011). [Dkt. 82, p. 4] In the *Little Rock* case, the Joshua Intervenors remained active participants throughout protracted litigation. Here, the lack of active representation of the class dramatically distinguishes these intervenors from the Joshua Intervenors.

Due to the failure of representation by the named plaintiff-intervenors, the Court is well within its authority to decertify the class and allow this action to continue with the United States and the District as the named parties. This is the manner in which the case has been actually prosecuted for the past eight years. The United States continues to represent the interests of the class; therefore, there is no need to allow new representatives to intervene at this late juncture in the case. Further, any potential intervenor could not meet the requisite intervention tests to establish that the United States is not adequately representing the interests of the class, as discussed in the District's prior brief [Dkt. 81, p. 5].

B. Class counsel has not ensured adequate representation of the class.

Because of the importance of class counsel to the prosecution of a class action, the 2003 amendments to Rule 23 added section (g) Class Counsel, giving the Court the duty to appoint class counsel once a class is certified. Subsection (4) states that the duty of class counsel is to "fairly and adequately represent the interests of the class." Prior to this amendment to Rule 23, courts applied the adequacy requirement found in section (a)(4) to class counsel as well as to the named representatives. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 626 (1997).

Here, because section (g) did not exist in 1982, the Court did not appoint class counsel for the intervening class, but Suzanne Griggs Keyes has always functioned as class counsel. In that role, she was obligated to adequately represent the interests of the class pursuant to section (a)(4). Section (g) was likely added to Rule 23 due to problems such as have arisen here---when class counsel fails to keep abreast of the issues, fails to ensure that the named representatives adequately represent the class interests, and most fundamentally, fails to prosecute on behalf of the class.

III. Alternatively, if the class is not dismissed, this Court has the discretion to limit discovery under the circumstances of this case to and set a fairness hearing after public notice.

If plaintiff-intervenors and the class are not dismissed, the Court should not allow them or the class additional discovery because they have not diligently attempted to comply with the schedule and various orders of the Court. A district court's decision regarding additional discovery is reviewed for abuse of discretion. *Leza v. City of Laredo*, 496 Fed. Appx. 375, 376 (5th Cir. 2012). Rule 16(b)(4) allows modification of a discovery schedule "only for good cause and with the judge's consent." *Id.* Further, the standard for good cause requires the party requesting additional discovery to show diligence in attempts to meet the deadlines. *Id.*

The Tenth Circuit has identified several factors applicable in reviewing decisions concerning the reopening of discovery. *Smith v. U.S.*, 834 F.2d 166, 169 (10th Cir. 1987). These factors are: 1) whether trial is imminent, 2) whether the request is opposed, 3) whether the non-moving party would be prejudiced, 4) whether the moving party was diligent in obtaining discovery within the guidelines established by the court, 5) the foreseeability of the need for additional discovery in light of the time allowed for discovery by the district court, and 6) the likelihood that the discovery will lead to relevant evidence. *Id.*

Here, an eight-year period of dormancy demonstrates a complete failure of diligence. The plaintiff-intervenors/and the class have waited until the ultimate decision is imminent to suddenly reemerge from silence and ask for additional discovery. Allowing additional discovery at this late point in the litigation

would prejudice the parties that have been diligently prosecuting this case and would delay the proceeding unnecessarily. The request is opposed by the District and not affirmatively supported by the United States. Further, the requesting party has remained dormant, allowing the case to move forward toward its imminent conclusion. Reopening discovery at this point would prejudice the non-moving parties and delay ultimate resolution of this case.

CONCLUSION

The Court should decertify this class and dismiss the plaintiff-intervenors and the class for failure to prosecute and for failure to maintain adequate class representation as required by Rule 23. Alternatively, if the class is allowed to remain, the Court should deny re-opening of discovery, and the Court should order a fairness hearing after appropriate public notice is given.

Respectfully submitted, this 17th day of May 2013.

SIMPSON COUNTY SCHOOL DISTRICT

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CERTIFICATE OF SERVICE

I certify that I have this day filed the above document with the Clerk of Court via the CM/ECF System, which caused notice of filing to be served on all registered counsel of record as listed below:

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