IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

MICHAEL I.[1] and KATHERINE S. ADAMS,
individually and on behalf of all others
similarly situated PLAINTIFFS

v. No. 2:14-CV-02013

UNITED SERVICES AUTOMOBILE ASSOCIATION;
USAA CASUALTY INSURANCE COMPANY; and
USAA GENERAL INDEMNITY CO DEFENDANTS

O R D E R

The parties to this matter entered a stipulation of dismissal on June 19, 2015. A clerk's order of dismissal was entered on June 22, 2015. It has only recently come to the Court's attention[2] that the matter was re-filed in the Circuit Court of Polk County, Arkansas, together with a motion for preliminary approval of class settlement, on June 23, 2015.[3] Notably, although this matter was pending in this Court until June 22, the stipulation of settlement was signed by counsel on June 16, 2015, and specifically defines "Court" as "the Circuit Court of Polk County, Arkansas."

This matter was properly removed to this Court on January 15, 2014, and was on this Court's docket for over 17 months. During that time period the Court expended time and resources

[1] The Court notes that Plaintiff's name was taken from Defendants' notice of removal (Doc. 1), but that the name appears to be erroneous. Plaintiffs are listed in the original complaint (Doc. 3) as *Mark* I. Adams and Katherine S. Adams.

[2] *See* Mark Friedman, *John Goodson's New Class-Action Strategy Takes Place of One Blocked by US Supreme Court*, Arkansas Business News, Dec. 14, 2015, http://www.arkansasbusiness.com/article/108665/john-goodsons-new-class-action-strategy-takes-place-of-one-blocked-by-us-supreme-court.

[3] The motion and attached stipulation of settlement are matters of public record and are also available on the settlement website at www.homeownersinsurancesettlement.com.

monitoring the case and relied on the parties' representations that they were actively engaged in settlement negotiations through private mediation (with the implicit understanding that any settlement would be reviewed by this Court) to stay the case for a period of months.[4] The Court eventually lifted the stay notwithstanding the parties' request to continue the stay past ten months.[5]

The clear inference to be drawn from the fact that counsel filed a stipulation of settlement in Polk County the day after dismissing the case that had been pending with this Court for over 17 months is that counsel wished to evade the federally-mandated review of the class and the proposed settlement by this Court in particular. *See* Fed. R. Civ. P. 23(e) (requiring court approval for settlement of claims of a certified class, which approval may be given "only after a hearing and on finding that [the proposed settlement] is fair, reasonable, and adequate"); *In re Wireless Telephone Fed. Cost Recovery Fees Litigation*, 396 F.3d 922, 934 (8th Cir. 2005) ("Rule 23(e) requires the court to . . . ensure that the [proposed settlement] agreement is not the product of fraud or collusion and that, taken as a whole, it is fair, adequate, and reasonable to all concerned."). This inference is supported by the fact that on May 13, 2015, this Court held a hearing in a separate case brought by "Mark and Kathy Adams" (also of Mena, Arkansas and presumably the same Plaintiffs in this matter) on preliminary approval of a class-action settlement of claims identical[6] to those raised in

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[4] Partly due to the extended stay in this case, the Court has since instituted a policy of not granting stays solely so parties can engage in settlement negotiations.

[5] The parties filed a request to extend the stay on March 16, 2015, representing that "[t]he parties have reached agreement on almost all material terms but require an additional 30 days to resolve outstanding issues." (Doc. 30, ¶ 2). The request for a 30-day extension of the stay was denied, as the case had already been stayed for ten month based on the parties' representations that settlement negotiations were ongoing.

[6] With the exception that Plaintiffs in the instant matter added claims of unjust enrichment and fraudulent concealment that would not likely have increased the amount of

the instant matter and brought by many of the same plaintiffs' counsel. (Case number 2:12-cv-02173, "Adams 1").[7] Both at that hearing and in an order entered on May 19, 2015,[8] the Court informed the parties of certain concerns it had with the proposed settlement and directed the parties to make certain revisions before the proposed settlement could be preliminarily approved. Counsel in this case would have been aware, therefore, of the kind of terms the Court would consider fair, reasonable, and adequate in regard to the claims asserted in this matter. Between the time the parties in Adams 1 submitted their amended stipulation of settlement for approval on June 4, 2015, and the time the Court approved that amended stipulation on June 24, 2015, counsel in this case voluntarily dismissed this action for the purpose of refiling it in state court (with the long-promised settlement agreement attached).

Defendants removed this action pursuant to the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d),[9] ostensibly seeking a federal forum for adjudication of the claims raised by Plaintiffs. It is now clear, however, that counsel on both sides at some point prior to

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recoverable damages.

[7] This case is a matter of public record, and the Court takes notice of the docket in Adams 1 and incorporates the record of that case in considering the matter of sanctions in this case.

[8] Adams 1, Doc. 44.

[9] CAFA requires an amount in controversy exceeding $5 million. In support of their allegations that the requisite amount was in controversy, Defendants attached an affidavit (Doc. 1-2) to the notice of removal, in which a staff claims advisor for Defendants estimated that approximate labor depreciation for claims for losses in Arkansas during a portion of the class period totaled $9,648,968. On the same day the stipulation of settlement was signed, Defendants filed a second affidavit (Doc. 34) "to correct or clarify the affidavit" filed at the time of removal. The affidavit notably did not include any statement as to a corrected potential amount of damages payable to the class. The Court notes that the maximum total amount payable under the Polk County settlement to class members is $3,445,598.

dismissal of the case from this Court determined that Polk County presented a more favorable forum for review of any negotiated settlement. This forum shopping is inimical to our system of justice and violates the spirit of the laws governing the jurisdictions of the state and federal sovereigns.

Furthermore, counsel appear to have dismissed this action for the purpose of evading this Court's review of their negotiated settlement. Having experienced or otherwise been made aware of the Court's scrutiny of the settlement in Adams 1, counsel had the benefit of knowing the Court's views on the issues that would be raised by the stipulation of settlement filed with the Circuit Court of Polk County upon dismissal of this case. Counsel likely believed that, given the almost identical nature of Adams 1 and this case, the Court would not approve a settlement so strikingly different from that entered into in Adams 1. The Court can only conclude that counsel anticipated that this Court would be diligent in its duty to protect the interests of absent class members and would be unlikely to approve a settlement that advanced the interests of class counsel (a large fee award with a clear sailing provision) and defense counsel (a claims made settlement with onerous claims requirements and a reversionary fund) while largely failing to protect the interests of the class, whose members would otherwise be entitled to collect potentially substantial sums of money from Defendants. Plaintiffs' counsel likely also anticipated that the Court would look with skepticism at a request for a large sum of attorneys' fees[10] for negotiation of a claims-made settlement, and that

[10] Counsel in Adams 1 requested (and were awarded) fees amounting to approximately one-third of actual class recovery after spending significant time and resources engaged in motion practice and in briefing a certified issue with the Supreme Court of Arkansas that was ultimately determinative of many of the issues in both Adams 1 and this case. Counsel in the matter now in Polk County are requesting fees amounting to approximately one half of *potential* class recovery, where counsel entered into settlement negotiations shortly after the case was filed without engaging in motion practice (a motion for judgment on the pleadings was withdrawn prior to a response being filed by Plaintiffs).

recovery of fees would likely have to bear some relationship to the amount ultimately recovered on behalf of the class.[11] Counsel therefore chose to dismiss the action from this Court to evade this review. The ethical problem presented by this case is compounded by counsel's abuse of process in using this Court and its exercise of jurisdiction as a bargaining chip in the negotiation of the ultimately questionable settlement.

All counsel of record are HEREBY ORDERED and DIRECTED to SHOW CAUSE as to why a non-monetary sanction[12] should not be imposed for violations of Federal Rule of Civil Procedure 11(b)(1).[13] In particular, counsel will be expected to show how their actions in making filings in this Court (to include the original removal, requests for stay, and/or stipulation of dismissal, etc.) were not made "for any improper purpose," including: (1) forum-shopping to seek a forum that counsel believed would best suit their own interests at any given time (to the detriment

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[11] Counsel may also have been aware of this Court's opinion in the case of *Eastwood v. Southern Farm Bureau Cas. Ins. Co.*, in which the Court chose to use a lodestar approach (awarding fees based on time actually spent on the case) to calculate attorneys' fees instead of awarding counsel's requested percentage of the common fund, noting the low claims rate and that nearly half of the common fund was earmarked for reversion to the defendant. 2014 WL 4987421 (W.D. Ark. Oct. 7, 2014) (stating further "When a class action settlement involves both a reversionary clause and a clear-sailing provision, the Court finds that it is appropriate to take a closer look at the settlement's terms to make certain that the rights and interests of the class have not been sacrificed in favor of class counsel and Defendant's pecuniary interests. When such settlement provisions are at issue, an inherent conflict of interest between counsel and the class may develop, particularly if class counsel's demand for fees exceeds the dollar amount to be paid to the class.")

[12] Federal Rule of Civil Procedure 11(c)(5)(B) appears to preclude the imposition of monetary sanctions in this case, but does not preclude imposition of a non-monetary sanction.

[13] The Court retains jurisdiction to impose Rule 11 sanctions after a voluntary dismissal. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990), superseded in part on other grounds by amendments to Rule 11; *Dakota, Minn. & Eastern R.R. Corp. v. Schieffer*, 715 F.3d 712, 712 (8th Cir. 2013) ("A court that suffers abusive conduct must retain jurisdiction to sanction that conduct.").

of class members); (2) wasting Government resources expended in adjudicating and monitoring this matter over 17 months only so counsel could gain leverage in settlement negotiations while ultimately evading federal review of the negotiated settlement; and/or (3) generally inappropriate procedural gamesmanship with no intent to actually litigate claims in good faith before this Court. Making filings in this Court, and invoking this Court's jurisdiction, for the purposes set out above would, viewed subjectively, have been done in bad faith and, viewed objectively, have "manifest[ed] either intentional or reckless disregard of the attorney[s'] duties to the court." *Clark v. United Parcel Service, Inc.*, 460 F.3d 1004, 1009 (8th Cir. 2006) (quotation omitted) (setting out the traditional standard for imposing Rule 11 sanctions and declining to consider whether the 1993 amendments to Rule 11 required a higher standard of subjective bad faith when sanctions are imposed sua sponte by the Court).

The Court will set a hearing, by separate order at a later date, to give all counsel the opportunity to be heard should they wish to present an argument why sanctions are not warranted. If, after the hearing, the Court determines that imposition of sanctions is warranted, the Court will give counsel notice of the nature of any sanctions it intends to impose and an opportunity to specifically oppose the appropriateness of such sanctions.

Counsel are encouraged, but not required, to appear at the hearing. If an attorney of record does not appear, however, such attorney may forfeit his or her opportunity to object to the imposition of sanctions. If the Court finds sanctions are warranted, the sanctions ultimately imposed will apply regardless of whether an attorney appeared at the hearing or otherwise objected to such sanctions.

The Clerk is directed to correct the caption of this matter to reflect the correct name of Plaintiff—Mark I. Adams.

IT IS SO ORDERED this 21st day of December, 2015.

/s/ P. K. Holmes, III

P.K. HOLMES, III
CHIEF U.S. DISTRICT JUDGE