Oral argument scheduled for February 16, 2012

NO. 11-5205

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELOUISE PEPION COBELL, *et al.*,
Plaintiffs-Appellees,

Kimberly Craven,
Objector-Appellant,

v.

KENNETH LEE SALAZAR, Secretary of the Interior, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia, No. 1:96-cv-01285 TFH

Reply Brief of Appellant Kimberly Craven

CENTER FOR CLASS ACTION FAIRNESS LLC
Theodore H. Frank
1718 M Street NW, No. 236
Washington, D.C. 20036
(703) 203-3848
Attorney for Appellant Kimberly Craven

AMENDMENT TO CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Undersigned counsel certifies the following:

A. Parties and *Amici*

In addition to the parties and *amici* listed in the opening brief, the Competitive Enterprise Institute and the Indian Land Tenure Foundation ("ILTF") have filed *amicus* briefs.

While the ILTF brief is styled as "in support of the Plaintiffs-Appellees and Defendants-Appellees," it asks for relief that this Court cannot grant unless it vacates the final judgment below and remands with instructions to modify the settlement on grounds not raised by Ms. Craven in this appeal. ILTF Brief 18 (asking this Court to issue injunctive relief against Department of Interior and Secretary of Interior). Ms. Craven's appeal takes no position on the fairness, structure, or implementation of the Land Consolidation Program, CRA §§101(a)(4), 101(e), that is the sole subject of the ILTF Brief. The ILTF "has lent financial support to the prosecution of this cause." PA285.*

Named plaintiff Elouise Cobell passed away October 16, 2011. Neither Ms. Cobell's representative nor any party has filed a Fed. R. App. Proc. 43(a)(1) motion as of January 6, 2012.

* "PA" stands for the plaintiffs' separate appendix in this case. Similarly, "DA" stands for the defendants' separate appendix, and "A" stands for Appellant Kimberly Craven's separate appendix. "OB," "PB," and "DB" refer to the opening brief, plaintiffs' response brief, and defendants' response brief respectively.

B. Related Cases

In addition to the cases listed in the opening brief, the government has argued in the Court of Federal Claims that the disposition of this case affects the disposition of the putative class action *Two Shields v. United States*, No. 11-531L (Court of Federal Claims).

Appeal No. 11-5229 (D.C. Cir.) was voluntarily dismissed October 20, 2011.

Appeal Nos. 11-5270, 11-5271, and 11-5272 (D.C. Cir.) have been consolidated with one another, and set for argument May 15, 2012.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules and Statutes

Other Authorities

GLOSSARY

A	Craven Appendix (filed October 17, 2011)
CRA	Claims Resolution Act of 2010, Pub. Law No. 111-291, 124 Stat. 3064 (2010)
DA	Defendants' Appendix (filed December 16, 2011)
DB	Defendants' Brief (filed December 16, 2011)
HAC	Historical Accounting Class
IIM accounts	Individual Indian Money trust account
OB	Craven's Opening Brief (filed October 17, 2011)
PA	Plaintiffs' Appendix (filed December 16, 2011)
PB	Plaintiffs' Brief (filed December 16, 2011)
TAC	Trust Administration Class
US *XXII* Brief	United States Brief for Appellees/Cross-Appellants, *Cobell v. Salazar*, No. 08-5500 & 08-5506

Summary of Argument

Craven's opening brief identified several independent legal errors that each individually required reversal of the settlement approval. Appellees' inconsistent arguments do not support affirmance.

Argument

I. The Government's Plenary Power Over Indian Affairs Was Not Exercised on Issues Relevant to This Appeal.

The settlement could not go forward without Congressional approval. The Justice Department did not have independent authority to settle on the terms that it settled. Legislation was required to create jurisdiction in the district court for the amended complaint, open the government fisc, and provide favorable tax treatment of class payments. Thus, when the CRA "ratified" the settlement, it simply gave legislative authority for settlement terms that the executive branch could not accomplish unilaterally. That was the only exercise of plenary power in the CRA, and Craven has not challenged the ability of Congress to create jurisdiction or change tax law with respect to this case.

But the appellees go further and claim that the plenary power affects the resolution of the fairness hearing. PB18; DB32. As Craven pointed out, this contradicts the structure and language of the settlement and CRA, which have several sections anticipating the possibility that the court would exercise independent decision-making over the fairness of the settlement, and might not approve it. OB27-

28. Appellees fail to address this argument or provide a statutory interpretation that does not render CRA §101(k) improperly nugatory. *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (all words in a statute must be given effect).

The CRA could have included factual findings by Congress about the fairness of the settlement. It didn't. The CRA could have attempted to mandate that the Trust Administration Class be certified. It didn't.[1] If, as appellees claim, objectors have no authority to argue the unfairness of the settlement, the CRA could have attempted to eliminate a fairness hearing, and simply imposed the settlement by fiat; Congress could have prohibited objectors from making an impotent appeal that challenged that exercise of plenary power. It didn't. Nothing in the CRA abrogated the standards of a fairness hearing or appellate review of a settlement approval. (Nor could it: as defendants concede (DB44-45), a fairness hearing is constitutionally required. A show-trial hearing where class members' arguments are by law irrelevant before they are made would not satisfy the "opportunity to be heard and participate in the litigation." *Philips Petroleum v. Shutts*, 472 U.S. 797, 812 (1985).) Perhaps Congress could have passed a law giving final administrative resolution of distribution like the one in *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73 (1977), or *Littlewolf v. Lujan,* 877 F.2d 1058 (D.C. Cir. 1989); they did not.[2]

---

[1] Nor could it; to prescribe the rule of decision in an individual case would present separation-of-powers problems. *United States v. Klein*, 80 U.S. 128 (1871).

[2] Plaintiffs' strategic settlement choice makes more sense once one accounts for the likelihood that class counsel anticipated that it could receive more in fees and incentive payments by structuring settlement through an Article III Rule 23

But the appellees would have this Court write all of this absent language into the statute, even though such an impermissible interpretation would contradict language that *is* in the statute that neither appellee addresses. Craven did not use the word "plenary," because, as Craven demonstrated in her opening brief, Congress's plenary power is irrelevant to Craven's arguments.[3]

II. The Settlement's Distribution Scheme Is Unfair.

Appellees argue for a presumption that the settlement is fair, but this is neither the law of this circuit nor good public policy. The D.C. Circuit "require[s] a searching examination into the reasonableness of the settlement." *Moore v. NASD, Inc.*, 762 F.2d 1093, 1106 (D.C. Cir. 1985) "In reviewing a proposed settlement, a court should not apply any presumption that the settlement is fair and reasonable." American Law Institute, *Principles of the Law of Aggregate Litigation* §3.05(c) (2010). *See also Manual for Complex Litigation (Fourth)* §21.61 at 310 (court must make "independent analysis of the

---

proceeding than what Congress would be willing to allocate in *Weeks*-style legislation. *Cf.* A656 (citing bipartisan criticism of fee request); A676 (discussing Cobell's rejection of proposed legislative solution in 2006-07). Having gerrymandered the settlement to forgo an immediate executive-branch administrative resolution (*cf.* OB26) and instead use the drawn-out Rule 23(e) process for their own personal benefit, plaintiffs cannot be heard to complain that class members ask for judicial review.

[3] Furthermore, as plaintiffs concede, plenary power does not trump due process requirements. PB16; *see, e.g.*, *Hodel v. Irving*, 481 U.S. 704, 717-18 (1987). Nor does the plenary power permit the government to retroactively repudiate a contractual obligation, much less a fiduciary one. *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 646 (2005); *Babbitt v. Oglala Sioux Tribal Pub. Safety Dept.*, 194 F.3d 1374, 1382 (Fed. Cir. 1999) (Garjarsa, J., concurring).

settlement terms"); *id.* ("judge must adopt the role of a skeptical client"); *see also Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997) ("undiluted, even heightened, attention").

Plaintiffs misstate Craven's argument in multiple respects. They falsely claim that Craven "concedes" "class members are not materially prejudiced relative to one another"; she said no such thing. *Contrast* PB27-28 *with* OB25-26. Plaintiffs claim Craven failed to support her argument that the Trust Administration distribution scheme was unrelated to the injuries alleged. PB34. This is false. *See* OB24-25. Craven noted that the upside-down distribution scheme where the greatest alleged injuries received the least amount of money was unprecedented; the appellees do not contend otherwise.

The appellees do not dispute that the distribution scheme is not materially different from the one that the government previously successfully argued against (US *XXII* Brief 57; A473) and that this Court called inherently "inaccurate and unfair," *Cobell v. Salazar,* 573 F.3d 808, 813 (D.C. Cir. 2009) (*Cobell XXII*). The government does not even contest that they are judicially estopped from arguing that the distribution is fair. OB22 n.4. Instead, appellees make several arguments for disregarding this Court's previous finding. All fail.

A. Law-of-the-Case Doctrine Precludes Finding the Settlement Fair.

The appellees argue that *Cobell XXII*'s legal holding that the distribution scheme for restitution was unfair was not discussing a settlement, and thus is not law of the case. This is a *non sequitur*; both *Cobell XXII* and the lower court's

characterization of the settlement call the *per capita* and *pro rata* schemes "restitution." A870. *Cobell XXII* held that a court had no power to implement a restitution scheme in this case because it was "inaccurate and unfair" to unnamed class members. That *is* the same question as whether an identical restitution scheme is "fair" under Rule 23(e).[4] The parties do not cite any authority for the assertion that "fair" in Rule 23(e) (or under the CRA) means something other than "fair" or that *Cobell XXII*'s finding that the scheme is "unfair" means something other than "not fair." They thus cannot claim that "this Court's review of the settlement entails an entirely different standard" (PB23; DB22). The "law-of-the-case doctrine applies to questions decided explicitly or by necessary implication." *LaShawn A. v. Barry*, 87 F.3d 1389, 1394 (D.C. Cir. 1996) (*en banc*); *PNC Fin. Svcs. v. CIR*, 503 F.3d 119, 128 (D.C. Cir. 2007) (Brown, J.) (implicit holding of earlier case binds later court on issue, even if not precisely the same issue). The appellees' *ipse dixit* that settling parties have the right to impose upon objecting unnamed class members what a court cannot has no basis,

[4] Indeed, defendants acknowledge that *Cobell XXII* "held that the district court could not award what were essentially monetary damages to compensate for asserted accounting shortfalls." DB12. But from the perspective of a class member waiving her right to an accounting, there is no material difference between the relief already rejected and the relief in this settlement. Defendants' claim that this is now a "substitute" or "consideration" instead of "restitution" (DB22) contradicts the district court's finding (A870) and the plaintiffs' lower-court characterization (PA333) ("the monetary payments serve as both equitable restitution to disgorge benefits conferred on the government through its breaches of trust, and damages to compensate class members for the harm caused by the government's breach of its fiduciary duty to account"), and does not identify a material legal difference.

precedent, or merit. The same result from the same issue is required: this settlement is unfair. *LaShawn A.*, 87 F.3d at 1393.

Plaintiffs (but not defendants) resort to arguing that Craven waived the law of the case. PB22. This is wrong. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. Escondido*, 503 U.S. 519, 534 (1992). Craven argued below that the *pro rata* and *per capita* aspects of the distribution were unfair. A669-73; A759. That she omitted mentioning that *Cobell XXII* came to the same conclusion using the same reasoning is not a waiver. "Rather than raising a new issue upon which the district court did not rule, [Craven] is adducing additional support for [her] side of an issue upon which the district court did rule, much like citing a case for the first time on appeal." *Koch v. Cox*, 489 F.3d 384, 391 (D.C. Cir. 2007). This Court should apply the controlling law even if litigants fail to cite the best authority *on appeal*. *In re Aqua Dots Lit.*, 654 F.3d 748, 752 (7th Cir. 2011) (Easterbrook, J.) (*citing Elder v. Holloway*, 510 U.S. 510 (1994)).

Plaintiffs argue that law-of-the-case application is "discretionary." PB22. But they fail to note binding precedent regarding the scope of that discretion. While "law-of-the-case doctrine is prudential," and "courts may 'reopen what has been decided,'… they should 'as a rule… be loath[] to do so in the absence of extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice.'" *PNC Fin. Svcs.*, 503 F.3d at 127-28 (*quoting Christianson v. Colt Indus.,* 486 U.S. 800, 817 (1988)). Appellees do not, and cannot, argue that *Cobell XXII*

was clearly erroneous, much less that it worked a manifest injustice. It is thus binding on this Court, and by itself requires reversal.

B. The Arbitrary Distribution Scheme Creates Impermissible Intraclass Conflicts.

Even if *Cobell XXII* didn't exist or bind this Court, its reasoning is correct.

Plaintiffs acknowledge that "Intraclass conflicts exist when the goals of one group of class members conflict with the goals of another." PB25. But that's true here, where class members with no hope of recovery have an interest in a settlement that wildly overcompensates them at the expense of class members who do have legitimate claims. *Uhl v. Thoroughbred Tech.,* 309 F.3d 978 (7th Cir. 2002), is not applicable. In *Uhl*, plaintiffs settled under a veil of ignorance and did not know the value of their trespass claim. Here, lead plaintiffs received an accounting, and knew where they stood: with a valueless claim—and they do not dispute Craven's characterization. A469; OB5. Meanwhile, others, such as the *Two Shields* class,[5] are,

[5] *Two Shields v. United States* (Fed. Cl. Case No. 11-531L). While one cannot assume the truth of the *Two Shields* complaint's allegations, the court can take judicial notice that the complaint was filed (Dkt. 1), that the complaint alleges hundreds of millions of dollars of damages, and that the government contends it overlaps with the Trust Administration Class (Dkt. 5). The Court can also draw reasonable inferences from the fact that a profitable and prominent law firm thought it worthwhile to investigate and bring such a class action on a contingent-fee basis, despite the additional burden that the lawsuit might be foreclosed by the *Cobell* settlement before there was any inquiry on the merits of the case. *Cf. Farmer v. Haas,* 990 F.2d 319, 321 (7th Cir. 1993) (Posner , J.) (ability to find contingent-fee counsel proxy for merit of case). Plaintiffs are thus wrong when they portray this appeal as "a single objector" versus "500,000 Indian trust beneficiaries" (PB2). This is an intraclass dispute between

according to government briefing in that case, waiving potentially multi-million-dollar claims for which they receive the same recovery as someone with a highly fractionated land interest.

Plaintiffs claim there is no intraclass conflict because Craven is only "speculat[ing]" that class members suffered different types of individualized damages. This not only contradicts plaintiffs' pleadings (A474-87), but it contradicts plaintiffs' brief in this appeal. PB1 ("government's management of the IIM Trust has been replete with loss, dissipation, theft, waste, and wrongful withholding of funds"). Moreover, plaintiffs' argument proves too much: they cannot have it both ways by simultaneously arguing both that the settlement is fair because class members have no claim (PB29) and that the class was appropriately certified. "[W]hen a claim cannot succeed as a matter of law, the Court should not certify a class on that issue." *McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 228 (2d Cir. 2008); *contra Sullivan v.*

---

the thousands of Indians who are overcompensated by the settlement and the thousands of Indians, such as the *Two Shields* class, whose rights are unfairly adversely affected by the settlement—exactly the sort of intraclass conflict that precludes settlement approval without separate representation. *Cf. also* Dkt. 3737, 3788, 3793, 3808, 3812, 3834 (unsuccessful attempts by Quapaw tribe to preserve their members' rights).

That Craven conceded that the settlement might not be too low *collectively* does not mean that she conceded (as plaintiffs falsely claim) that the subclass of Indians with claims like those in *Two Shields* and other trust mismanagement claims were not unfairly undercompensated; indeed, she argued the contrary. *Contrast* PB31 *with* OB20-26; OB34.

DB Investments, No. 08-2785, 2011 U.S.App. LEXIS 25185 (3d Cir. Dec. 20, 2011) (*en banc*).

Moreover, plaintiffs' "speculation" argument ignores the burden of proof the appellees carry. When settling parties ask a court to evaluate a settlement of dozens of—or even two—different types of claims, they must demonstrate that they have investigated each of these claims and that the settlement fairly approximates their litigation value. *Mirfasihi v. Fleet Mortg. Corp.*, 356 F. 3d 781, 785-86 (7th Cir. 2004) (Posner, J.); *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 284-85 (7th Cir. 2002) (Easterbrook, J.); *see also In re GMC Pick-Up Truck*, 55 F.3d 768, 806 (3d Cir. 1995). As plaintiffs themselves note, fairness depends on "evaluat[ing] the terms of the settlement in relation to the strength of the plaintiffs' case." *Thomas v. Albright*, 139 F.3d 227, 231 (D.C. Cir. 1998). There is no record evidence that plaintiffs even considered (much less investigated or evaluated) the *Two Shields* claims before waiving them, much less the dozens of different types of claims involving thousands of different tracts of land. Perhaps plaintiffs are correct that they fairly and adequately settled the *Two Shields* putative class's claims for less than a penny on the dollar even as other class members received over $1800 for tiny fractionated accounts. But it is plaintiffs' obligation to make that showing for the *Two Shields* class, and for each of the other dozens of causes of action waived in the sprawling Trust Administration Class. The merits of the various disparate causes of action are "to be considered, not

assumed." *Mirfasihi*, 356 F.3d at 786.[6]

The settlement reaches its unfair result by wildly overcompensating class members with no claims (as plaintiffs themselves admit (PB29))[7] while extinguishing the rights of class members with sizable potential claims such as the *Two Shields* class. This Court and the Supreme Court have repeatedly rejected such collective justice, even with respect to the government's relationship with Indians at the expense of individual rights. OB13-14 (citing cases). Plaintiffs are incorrect when they ask (PB23) this Court to include the effect of the Land Consolidation Fund and look at the "fairness of the settlement to the class as a whole"; *Thomas*, 139 F.3d at 233, is referring to the fairness of unitary injunctive relief in a (b)(2) case, not the distribution of money in a (b)(3) class. If the mere indiscriminate direction of more money to a (b)(3) class could solve an intraclass infirmity, the Supreme Court in *Amchem* or *Ortiz* would have remanded for fact-finding as to whether enough money benefited the entire class to permit the adverse effects on a subclass; the settling parties could have simply kicked in more money to salvage those settlements if it did not. But the

[6] That this would be difficult in this particular instance given the unprecedented scope of the Trust Administration Class and waiver only shows the importance of the commonality determination to the adequacy of representation. Section IV, *infra*.

[7] Plaintiffs attempt to distract the Court by protesting the quality of Craven's record citation that there are thousands of class members with fractionated interests and less than a dollar at stake receiving over $1800 each. PB28. But they don't dispute the truth of the proposition. Nor can they. *E.g.*, *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 10 (D.D.C. 1999) ("16,700 IIM trust accounts with a stated balance below one dollar and no activity for at least eighteen months."); *Cobell v. Kempthorne*, 532 F. Supp. 2d 37, 80 (D.D.C. 2008) (775,000 fractionated land interests of "tiny" value).

Supreme Court instead held that the settlement could not stand, period. Even if the Land Consolidation fund was a net class benefit,[8] it does not save this settlement, either.

Craven has more than met any burden of showing intraclass conflict. Multiple courts have repeatedly rejected settlements as a matter of law where, as here, the wide variety of claims that a single class settlement attempted to resolve inherently created impermissible, and even unconstitutional, intraclass conflicts—even when the settlement might otherwise have prevented intractable litigation. *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 193-194 (5th Cir. 2010); *Spano v. Boeing Co.*, 633 F.3d 574, 591 (7th Cir. 2011) (Wood, J.); *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 314-16 & n.28 (5th Cir. 2007).

Defendants argue that "a settlement is not unreasonable simply because some class members might benefit more than others." But this is a straw man: Craven does not claim otherwise. OB25-26. The problem here is the magnitude of over- and undercompensation. An $1850 overpayment to class members who have no conceivable claim creates an intraclass conflict with other class members, because their share is reduced by tens of millions of dollars because of that overpayment. The

[8] It is not. Plaintiffs are incorrect that "Interior must use those funds to purchase highly fractionated Trust interests at market rates." PB8. *First*, $285 million of that fund is designated for government expenses. A564. More importantly, the settlement merely obligates Interior to *attempt* to purchase fractionated interests; if this unenforceable promise is not satisfied, the money reverts to Treasury without consequence. A565. Nor is the Fund a net class benefit, because a class member must surrender consideration at market value to receive cash from the fund. PB8.

"rough justice" referred to by defendants (DB41) applies to the type of "modest" case where class members are getting one cereal box instead of two. *Reynolds*, 288 F.3d at 282 (7th Cir. 2002); *ALI Principles* §3.05(a)(3), (b). If multi-million-dollar claims can be extinguished by "rough justice," then *Amchem* and *Ortiz* and *Katrina* would have come out the other way. Appellees fail to mention *Reynolds* or the *ALI Principles*, much less explain why they are incorrect; nor do they reconcile their position with *Amchem*.

These are errors of law that require reversal; at a minimum, it was an abuse of discretion for the Court to fail to acknowledge or address Craven's argument.

C. Opt-Outs Do Not Resolve the Unfairness.

Appellees ask the Court to disregard any unfairness because of the option of an opt-out. This is wrong.

> "[T]hat the class members have a right to opt out does not diminish the extent to which a class action settlement is an exercise of judicial power. Regardless of whether class members are given opt-out rights, the court is still required to ensure that representation is adequate and that the settlement is fair to class members. The settlement of the class action is not an act of judicial mediation; it is an act of judicial power. Second, the 'consent' purportedly given by class members in deciding not to opt out is hardly comparable to the consent given by individual plaintiffs in deciding to settle their own traditional lawsuits. Because opt-out rights are, as the Delaware Supreme Court has observed, 'infrequently utilized and usually economically impracticable,' we would be blind to reality to think that any consent implied by class members in deciding not to opt out is comparable to the consent given by individual plaintiffs in settling their own lawsuits."

Epstein v. MCA, Inc., 50 F.3d 644, 667 (9th Cir. 1995), *rev'd on other grounds sub nom. Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996); *cf. also Lukenas v. Bryce's Mountain Resort, Inc.*, 66 F.R.D. 69, 72 (W.D. Va. 1975), *aff'd* 538 F.2d 594 (4th Cir. 1976) ("opt-out provisions of Rule 23(c)(2) may not be used to achieve compliance with the prerequisites of 23(a)"); *Small v. Lorillard Tobacco Co.*, 252 A.D.2d 1, 11 (1998).[9] The "right of parties to opt out does not relieve the court of its duty to safeguard the interests of the class and to withhold approval from any settlement that creates conflicts among the class." *GMC Pick-Up*, 55 F.3d at 809.

III. The Mandatory 23(b)(2) Class Settlement Is Impermissible.

A. The Monetary Claims Are Not "Incidental" to the (b)(2) Class.

Defendants acknowledge the undisputed minimum[10] baseline of *Wal-Mart* that "Rule 23(b)(2) 'does not authorize class certification when each class member would be entitled to an individualized award of money damages.'" DB38 (*quoting Wal-Mart*).

[9] The government suggests in a footnote that Craven does not have standing to challenge the fairness of the settlement. *Devlin v. Scardelletti* holds otherwise. Craven's "complaint clearly falls within the zone of interests of the requirement that a settlement be fair to all class members." 536 U.S. 1, 7 (2002) (citing Rule 23(e)). *See also In re Cendant Corp. Prides Litig.*, 243 F.3d 722, 731 (3d Cir. 2001); *In re GMC Engine Interchange Litig.*, 594 F.2d 1106, 1122 (7th Cir. 1979).

[10] *Wal-Mart* did not resolve the question, but strongly suggests the correctness, of a higher threshold for due process: the inclusion of any monetary claims, even incidental ones, requires the right to opt out. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2341, 2559 (2011); *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994). Craven endorses this proposition as an alternative ground to strike the (b)(1)(A) and (b)(2) certification. OB31.

Neither appellee, however, acknowledges that this principle is directly applicable to the right of accounting under the Trust Reform Act, the claim being settled via the mandatory Historical Accounting Class. As this Court determined in *Cobell XXII*, the Department's accounting duty (and thus the accountholder's entitlement to an accounting) will vary from beneficiary to beneficiary. Therefore, also as a matter of law, an indivisible remedy is not warranted, whether a unitary injunction or uniform monetary payments; a (b)(2) class is not appropriate.

The plaintiffs obfuscate the term "incidental," by suggesting that it is salient that the $1,000 payments constitute less than 10% of the total settlement amount and that the "main purpose" of the litigation was trust reform generally (as opposed to the tens of billions of dollars Cobell demanded). PB41. Even assuming those claims are correct, they have no bearing on whether the HAC payments are "incidental." This sort of ad-hoc balancing test or "comparison" of "the importance of injunctive and declaratory relief" is exactly the position of the Ninth Circuit in *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 618 (9th Cir. Cal. 2010), that the Supreme Court rejected.

Instead, the Supreme Court adopted the test of *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998). *See Wal-Mart*, 131 S.Ct at 2560. The question of the appropriateness of 23(b)(2) certification hinges entirely on whether the monetary relief is *by itself* "incidental"—does it flow directly from liability to the class as a whole? This payment does not so qualify.

Where the degree of entitlement under the operative law varies among class members, "equitable restitution" (A870) payments qualify as non-incidental monetary

relief. OB31. Ultimately, defendants' claims that "the $1,000 settlement payment is in lieu of preparation and distribution to each HAC class member of an historical statement of account" (DB37) ring hollow given this Court's earlier pronouncements that certain "class sub-groups" were not entitled to accountings at all. *Cobell XXII,* 573 F.3d at 813-14. "At some level of abstraction, a degree of cohesion will exist in almost any putative class," but fundamentally "the question then is not one of fault but one of remedy." *Blackman v. District of Columbia*, 633 F.3d 1088, 1094 (D.C. Cir. 2011) (Brown, J., concurring); OB 34 n.7 (*citing cases*). When the law demands unique, severable, and divergent treatment for differing class members, (b)(2) certification is not permissible. *Wal-Mart,* 131 S.Ct. at 2557; *Blackman*, 633 F.3d at 1094 (Brown, J., concurring).

B. The (b)(1)(A) Certification Does Not Resolve the Infirmity.

Craven cited several federal cases for the proposition that the HAC cannot be certified under (b)(1)(A) for the same reason that it cannot be certified under (b)(2). OB30 & n.5.[11] Due process requires the availability of an opt out when non-incidental monetary claims are to be encompassed in a class action. *Wal-Mart,* 131 S.Ct. at 2557. *Wal-Mart* itself applied its reasoning to both (b)(1) and (b)(2) classes: "Unlike (b)(1) and (b)(2) classes, the (b)(3) class is not mandatory; class members are entitled to receive the best notice practicable under the circumstances and to withdraw

[11] Plaintiffs' claim that Craven waived this argument, PB35, is thus incorrect. Craven discussed for several pages why neither (b)(1)(A) or (b)(2) certification was appropriate. OB28-34. This is not "cursory." That plaintiffs disagree that the (b)(2) analysis also applies to (b)(1)(A) does not mean that that argument was not made.

from the class at their option. Given that structure we think it clear that individualized monetary claims belong in Rule 23(b)(3)." *Id.* at 2558 (citation omitted).

Defendants redact a quote from *Amchem* to support the (b)(1)(A) certification, but the full sentence supports Craven. *Compare* DB38 n.6 *with Amchem*, 521 U.S. at 614. The government only references the "practical necessity" language of *Amchem*, perhaps recognizing that earlier holdings in *Cobell XVII* and *XXII* (OB5) foreclose the idea that the Trust Reform Act requires an equivalent accounting for each account holder and thus nullify the reasoning behind (b)(1)(A) certification. "[P]ractical necessity" cannot justify the (b)(1)(A) class here. One cannot plausibly compare the directional flow of river water (*Amchem*, 521 U.S. at 614) —inherently unitary because of the laws of physics—to the mere administrative inconvenience of having to discharge the government's Trust Reform Act duties to individualized IIM accounts in individualized ways, as *Cobell XXII* instructed the lower court to do.

Furthermore, the ERISA cases cited by the plaintiffs that certify (b)(1)(A) classes (PB36-37) are readily distinguishable by noting that the settlement here effects no alteration of "prospective accounting rights" (DB40) or of the forward-looking fiduciary relationship. As the lower court held, the relief is a retrospective "restitution type payment… to make up for not getting the account[ing]." A776. *See In re Dennis Greeman Sec. Litig.*, 829 F.2d 1539, 1545 (11th Cir. 1987) ("Rule 23(b)(1)(A) does not apply to actions seeking compensatory damages… (b)(1)(A) certification is for cases seeking injunctive and declaratory relief.").

The prohibition on non-incidental relief under (b)(1)(A) classes parallel the restriction that applies to (b)(2) classes. Thus, the plaintiffs' contention that "by contrast [*to Daskalea*] that the monetary relief provided to the Historical Accounting class is not individualized" (PB37) and the defendants' contention that "the per capita $1,000 payment to each Historical Accounting Class member here is not an individualized award of monetary damages" (DB40) both miss the mark. The settling parties cannot by fiat make individual non-incidental claims non-individual through one-size-fits-all relief. *Cf. In re Monumental Life Ins. Co.*, 365 F.3d 408, 415 (5th Cir. 2004) ("Certification does not hinge on the subjective intentions of the class representatives and their counsel in bringing suit."). The parties' conception unfairly contradicts this Court's previous recognition that the accounting by law would treat different "sub-groups" differently. *Cobell XXII*, 573 F.3d at 813-14.

C. 23(b)(3) Recertification Allows 23(b)(2) Classes to Settle for Monetary Relief.

The parties claim that Craven's argument puts (b)(2) classes in an "untenable situation." PB40. Not so. There is an intermediate solution between full litigation of injunctive relief claims and disregarding the limitations of (b)(2): request recertification of the (b)(2) class under 23(b)(3). The (b)(3) certification gives class members the right to opt out, a right that is constitutionally mandated when monetary relief predominates. Plaintiffs may only maintain their status as a 23(b)(2) class if they continue, in abidance with the rule, to seek final injunctive relief; "an injunction that

orders the payment of money" is monetary. *See Richards v. Delta Air Lines, Inc.,* 453 F.3d 525, 530-31 (D.C. Cir. 2006).

As a policy matter, this procedure of recertification is common sense. Rule 23(b)(2) classes are mandatory in part because the inclusion or exclusion of any class member makes no difference in light of the class's unitary nature. Jeffrey H. Dasteel & Ronda McKaig, *What's Money Got to Do with It?*, 80 Tul. L. Rev. 1881, 1885 (2006). The right to opt out also constitutes an important check on the adequacy of the lead plaintiffs' representation. David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 Fla. L. Rev. 657, 663 (2011); *see also Reeb v. Ohio Dep't of Rehab. & Corr.*, 435 F.3d 639, 647 (6th Cir. 2006). If named plaintiffs decide to waive the class's right to injunctive relief, especially injunctive relief that is already won, dissenting class members should be permitted to opt out and take up the cause of injunctive relief themselves. Certainly, an individual beneficiary can choose to "release trustees from a duty to account." DB37. But that's not what happened here, where the release was involuntarily imposed upon the beneficiaries. Permitting mandatory monetary settlements would allow unscrupulous defendants to pay off named plaintiffs in exchange for the waiver of more valuable injunctive relief. *See generally* Marcus, 63 Fla. L. Rev. at 702-08 (2011).

These concerns are compounded further when the injunctive relief is divisible and the right belongs to each discrete individual rather than the group itself. Rule 23(b)(3) captures the growing edge of class actions, a category which this suit falls into for several reasons. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 861-62 (1999).

Recertification is the solution for a 23(b)(2) lead plaintiff who wishes to settle for money. Cases like *DeBoer v. Mellon Mortgage Co.*, 64 F.3d 1171 (8th Cir. 1995) are simply superseded by the *Wal-Mart* decision with which they conflict.

IV. The Sprawling Trust Administration Class Cannot Be Constitutionally Certified.

Craven invited the appellees to identify a single precedent of a class as sprawling as this one being constitutionally certified. OB35-38, 42. The appellees did not—and cannot—rise to the challenge. The certification is unprecedented and cannot stand.

A. Commonality and Cohesion Merges with the Admitted Constitutional Requirement of Adequacy of Representation.

Appellees rest on the language of the CRA permitting (though not requiring) the district court to certify the Trust Administration Class without meeting the Rule 23 standard—or offering any other standard for class certification. But as the plaintiffs concede (PB16), the plenary power of Congress does not trump due process, and the certification of the Trust Administration Class is not constitutional.

Appellees do not—and cannot—cite any precedent holding that 23(a)(2) commonality and (b)(3) predominance are not required for due process. Instead, they focus on *Shutts*, which appellees claim requires only (a)(4) adequacy to satisfy the Constitution. But (with the exception of an opt-out procedure, 472 U.S. at 812) nowhere does *Shutts* indicate that its list of constitutional minimums are *sufficient* for due process, as opposed to merely necessary. Indeed, this Court has noted that "the

constitutional concerns raised in *Shutts* and *Ticor* may also implicate the concerns underlying Rule 23." *In re Veneman*, 309 F.3d 789, 796 (D.C. Cir. 2002). It makes sense that no court has ever definitively foreclosed commonality issues from due process consideration, because the Supreme Court has repeatedly held that (a)(2) commonality and (a)(3) typicality "tend to merge with the adequacy-of-representation requirement." *General Tel. Co. of SW v. Falcon*, 457 U.S. 147, 157-58 n.13 (1982). *Accord Wal-Mart*, 131 S.Ct. at 2551 n.5; *Amchem*, 521 U.S. at 626 n.20. Adequacy of representation is not possible where, as here, the class is "so enormously diverse and problematic" to preclude commonality and cohesion. *Amchem*, 521 U.S. at 622-26 & nn.17, 20. *See also* OB44-45 (*citing cases*).

Neither appellee explains why *Falcon*'s holding that commonality tends to merge with adequacy does not control this Court; nor do they attempt to identify a limiting principle for exceptions where adequacy might exist even if commonality does not. If commonality is a prerequisite for adequacy, and adequacy is a prerequisite for constitutionality (as *Shutts* holds and all appellees concede), it is simple transitive logic that commonality is a prerequisite for constitutionality.

Even beyond *Falcon* and *Wal-Mart*, common sense tells us that the appellees' assertion that Congress has unlimited authority to override the commonality requirement cannot be true. Imagine a scenario where the banking industry attempts to resolve the robo-signing and predatory-lending litigation with a prepackaged class action settlement by successfully lobbying Congress to pass a "Mortgage Claims Resolution Act" that certifies a national class to extinguish all possible individualized

causes of action against every bank and mortgage-holder in America. On its face, this would be a misuse of aggregate litigation procedure. Richard Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. Chi. L. Forum 475 (2003). *Wal-Mart* certainly would not permit such a class certification. But the appellees provide no limiting principle for Congress's power to constitutionally agglomerate wildly disparate claims. By appellees' argument, Congress has the unfettered authority to mash together unrelated claims in a single aggregate litigation, despite the obvious due-process effects on unrepresented plaintiffs. In contrast, Craven proposes a bright-line rule consistent with Supreme Court precedent that protects the due-process rights of absent class members—but precludes certification here.

B. As the Government Correctly Argues Elsewhere, the Trust Administration Class Cannot Be Certified Under Rule 23(a)(2).

Defendants do not attempt to defend the district court's conclusory finding of 23(a)(2) commonality (which failed to acknowledge the *Wal-Mart* standard); indeed, the government has argued that even a subset of the Trust Administration Class consisting of a single one of the Trust Administration Class's claims relating to a single oil field cannot meet commonality. *Two Shields* Dkt. 11 at 11-13.

For some reason, plaintiffs do argue 23(a)(2) commonality exists. PB50-54. But plaintiffs' argument is undercut by their own briefing. Plaintiffs concede—indeed, affirmatively argue—that class members' claims are highly individualized and that Interior exercised its fiduciary duties to different class members in different ways.

PB30; PA93-163.[12] Plaintiffs further concede that "many class members" have no legitimate cause of action for trust mismanagement. PB33. The common questions that matter for determining commonality and cohesion are those "that qualify each class member's case as a genuine controversy." *Amchem*, 521 U.S. at 623. *Amchem*, like *Wal-Mart* did later, rejected plaintiffs' reasoning. "The harmfulness of asbestos exposure was indeed a prime factor common to the class… But uncommon questions abounded." 521 U.S. at 610. Common issues must be of a kind that resolving them "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 131 S.Ct. at 2551. Plaintiffs' argument that "systemic" and "pervasive" trust mismanagement (PB53) satisfies commonality contradicts the result of *Wal-Mart*, where the Ninth Circuit unsuccessfully made the same argument about discrimination. *Dukes*, 603 F.3d at 596 n.18.

V. The Millions of Dollars in Proposed and Actual Class Representative Payments Requires Decertification.

As an initial matter, appellees' characterization that the "class representatives sought $2.5 million in incentive payments and $10.5 million in expenses; the district court granted only the incentive award and denied the additional expenses" (DB51-52; PB54-55) misstates the record. *First*, as defendants below correctly argued, the $10.5

[12] It is odd that plaintiffs are treating a 2000 report as dispositively refuting lead plaintiff Cobell's 2007 testimony, and give no other explanation for why she gave testimony that plaintiffs now claim not to be true. Cobell is, as plaintiffs note, revered; we hope plaintiffs are not now suggesting she lied to Congress.

million was not appropriate "expenses." Dkt. 3697. The $10.5 million request included "charges for political and lobbying activities; millions paid to public relations firms and media consultants; [and] overhead charges for rent, electricity, [and] insurance." *Id.*[13] *Second*, this $10.5 million request is not yet fully "denied" as a reconsideration motion remains pending. A792 n.2.

In any event, the $2.5 million alone—approximately $2.5 million more than the lead plaintiffs could have received in litigation or in the settlement—is every bit as damning as the full $13 million. In a fiduciary context, the receipt of a disproportionate material benefit for taking a particular position is a conflict of interest. An attorney that received a substantial sum from the opposing party would be required to get a written waiver of the conflict from her client. *In re Hager*, 812 A.2d 904 (D.C. 2002). A corporate "director who receives a substantial benefit from supporting a transaction cannot be objectively viewed as disinterested or independent." *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 362 (Del. 1993). *See also Attorney Griev. Comm'n v. Stein*, 819 A.2d 372 (Md. 2003) (self-serving drafting of will). If a mere "long-standing personal friendship" between counsel and a lead plaintiff is the sort of conflict of interest that makes a finding of adequacy an abuse of discretion, how can it be acceptable for class counsel to promise to seek millions of dollars of lead-plaintiff incentives in a case where plaintiffs concede that lead plaintiffs' claims

[13] Defendants also correctly stated below that the request "threatens [representatives'] fiduciary obligation to the classes," *id.*, the same position Craven takes here.

are valueless (OB5)? *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1255 (11th Cir. 2003).

VI. Silence Is Not Consent.

Craven argued that it was bad law and bad public policy to characterize the silence of class members as class approval of a settlement when class members had little access to legal assistance; despite these obstacles, there were dozens of objections, including multiple objections to the intraclass equities of the settlement. OB49-51. Appellees do not dispute Craven's public policy reasoning. Plaintiffs instead rely (PB59) on a sentence in *GMC Pick-Up* that says "Courts have generally assumed that 'silence constitutes tacit consent to the agreement.'" 55 F.3d at 812. Because plaintiffs, like Craven, wish to rely on *GMC Pick-Up*, Craven asks this Court to review that opinion and the authorities it cites (and in particular, the two sentences immediately after the sentence plaintiffs quote), decide for itself whether Craven or plaintiffs have most accurately characterized its holding, and follow the Third Circuit's reasoning. 55 F.3d at 812-13. The district court's finding is not harmless; it applied the wrong standard of law, which is a *per se* abuse of discretion. *Southeastern Fed. Power Customers, Inc. v. Geren*, 514 F.3d 1316, 1321 (D.C. Cir. 2008).

VII. The District Court Impermissibly Prejudiced Objectors.

The appellees do not dispute on appeal that Craven's briefing complied with D.D.C.Loc.Civ.R. 7, that the plaintiffs' motion to strike did not, that motions to strike are disfavored, that the motion to strike claimed (falsely) to be unopposed, that the

judge acted before Craven responded to the motion, or that Craven had no notice of the purported need to intervene to file an opposition. Nor do they dispute Craven's argument (OB52) that an intervention requirement to file an opposition brief undermines the *reasoning* of *Devlin*'s desire for efficiency, even if *Devlin* does not address the specific question of whether an objector could oppose a post-objection motion for final approval without intervention. It does little good if an objector need not intervene for appeal if an objector must intervene to have a fair opportunity to address legal arguments.

Appellees claim that there was no prejudice because Craven's counsel was permitted to speak for ten minutes at the fairness hearing. PB60; DB54. But speaking for ten minutes to cover Craven's objection and arguments made in response to the motion for final approval of the settlement is not the same as a stricken 31-page brief that cites dozens of cases in response to otherwise unrebutted motions for approval. *Compare* A758-60 *with* A687-744; *cf.* Dkt. 3762, 3764. The district court made several rulings and factual findings at the request of the appellees that Craven did not have a fair opportunity to rebut. *Compare, e.g.*, A710-12 *with* A848 (failing to address Craven's argument); A713-15 *with* A846 (failing to address Craven's argument); A722-23 *with* A778 (ignoring Craven's evidence in finding "there was no [$7 billion] offer outstanding"); A723-25 *with* A778-79 (failing to address Craven's argument).

Even defendants concede that due process requires "an opportunity to be heard." DB44. Craven was not given a fair opportunity to be heard, because she was not given a fair opportunity to respond to the new arguments in the motion for

settlement approval, nor notice that the court would retroactively apply an intervention requirement that undermines *Devlin*. (Moreover, the Court ruled on the 23(b)(2) opt-out issue before the fairness hearing, and only heard argument from the appellees on the question of the applicability of *Wal-Mart*. OB10-11.) Aside from the assertion of lack of prejudice, neither appellee disputes the applicability of, or even attempts to distinguish, *In re Mercury Interactive Litig.*, 618 F.3d 988 (9th Cir. 2010). The procedural irregularities were reversible error.

CONCLUSION

For the several independent reasons listed above, the district court decision to approve the settlement must be reversed.

Dated: January 6, 2011

Respectfully submitted,

/s/ Theodore H. Frank

Theodore H. Frank
CENTER FOR CLASS ACTION
FAIRNESS LLC
1718 M Street NW, No. 236
Washington, DC 20036
Telephone: (703) 203-3848
Email: tfrank@gmail.com

Attorney for Appellant Kimberly Craven

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because this brief contains 6,992 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(a)(1), as counted by Microsoft Word 2010.

This brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Garamond font.

Executed on January 6, 2012.

/s/ Theodore H. Frank

Theodore H. Frank
CENTER FOR CLASS ACTION FAIRNESS LLC
1718 M Street NW, No. 236
Washington, DC 20036
Telephone: (703) 203-3848
Email: tfrank@gmail.com

Attorney for Appellant Kimberly Craven

PROOF OF SERVICE

I hereby certify that on January 6, 2012, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the District of Columbia Circuit using the CM/ECF system, which will provide notification of such filing to all counsel of record.

Executed on January 6, 2012.

/s/ Theodore H. Frank
Theodore H. Frank
CENTER FOR CLASS ACTION FAIRNESS LLC
1718 M Street NW, No. 236
Washington, DC 20036
Telephone: (703) 203-3848
Email: tfrank@gmail.com

Attorney for Appellant Kimberly Craven