

1 UNITED STATES COURT OF APPEALS
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT

3
4
5 ELOUISE PEPION COBELL, ET AL.;
6 KIMBERLY CRAVEN,

7 Appellant,

No. 11- 5205

8 v.

9 KENNETH LEE SALAZAR, SECRETARY
10 OF THE INTERIOR, ET AL.,

11 Appellees.

12 Thursday, February 16, 2012

13 Washington, D.C.

14 The above-entitled matter came on for oral
15 argument pursuant to notice.

16 BEFORE:

17 CIRCUIT JUDGES ROGERS, TATEL, AND BROWN

18
19 APPEARANCES:

20 ON BEHALF OF THE APPELLANT:

THEODORE H. FRANK, ESQ.

21 ON BEHALF OF THE APPELLEES SECRETARY

22 OF THE INTERIOR, ET AL.:

THOMAS H. BONDY, ESQ.

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24 ON BEHALF OF THE APPELLEES COBELL, ET AL.:

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P R O C E E D I N G S

THE CLERK: Case number 11-5205, Elouise Pepion Cobell, et al.; Kimberly Craven, Appellant v. Kenneth Lee Salazar, Secretary of the Interior, et al. Mr. Frank for the Appellant; Mr. Bondy for Appellee, Secretary of the Interior, et al.; Mr. Charnes for Appellees Cobell, et al.

JUDGE ROGERS: Good morning. All right. Good morning.

ORAL ARGUMENT OF THEODORE H. FRANK, ESQ.

ON BEHALF OF THE APPELLANT

MR. FRANK: Good morning, may it please the Court, Theodore Frank for Appellant, Kimberly Craven, pro bono.

Wal-Mart v. Dukes had two primary holdings, and unfortunately the District Court failed to apply each of them correctly, and these independent errors of law in addition to the other errors we identified in our briefs provide grounds for reversing the Court's settlement approval.

First of all, the District Court found that the 23(b)(2) settlement was appropriate because the relief was restitution type payments or inequitable restitution in lieu of the injunctive relief sought by the parties in their initial complaint. But as *Wal-Mart v. Dukes* confirmed, Rule 23(b)(2) does not speak of equitable remedies, generally, but of injunctions and declaratory judgments.

JUDGE TATEL: But in *Wal-Mart* the Plaintiffs sought

1 injunctive relief and back pay right from the beginning,
2 correct?

3 MR. FRANK: Correct.

4 JUDGE TATEL: And here the Plaintiffs sought just
5 injunctive relief, and in fact the amended complaint that the
6 District Court eventually certified only sought injunctive
7 relief. So, isn't the question in this case whether or not
8 Plaintiffs who bring an injunctive action can settle for
9 monetary relief? And that's a different question than *Wal-*
10 *Mart* raised, isn't it?

11 MR. FRANK: It's a slightly different question, but
12 once they converted their injunctive complaint to a monetary
13 complaint --

14 JUDGE TATEL: Well, but they didn't. The amended
15 complaint that Judge Hogan certified only seeks injunctive
16 relief.

17 MR. FRANK: That's correct.

18 JUDGE TATEL: Yes. So, the question really is
19 whether an injunctive action can be settled for monetary
20 relief. At least that's what the case looks like to me. It
21 doesn't mean you still don't, you sold me, you have a good
22 case, I'm just trying to ask you what lens we look at this
23 through.

24 MR. FRANK: Certainly --

25 JUDGE TATEL: Isn't that right?

1 MR. FRANK: -- that is an issue, but the critical
2 issue is whether they can settle it for monetary relief and
3 continue the (b)(2) certification that's mandatory for bidding
4 an opt out.

5 JUDGE TATEL: Well, but suppose it was, suppose the
6 Court had concluded that you can settle a -- or suppose the
7 rule is that you can settle an injunctive, a properly
8 certified injunctive action for damages if it's fair,
9 reasonable, and adequate; and it wouldn't be fair if, the
10 settlement wouldn't be fair if, you know, there are the kinds
11 of interclass conflicts that you have alleged. I mean, in
12 other words, do you see my point? It wouldn't -- just because
13 you convert, just because you look at the issue the way I just
14 asked you about, that is whether you could settle an action,
15 an injunctive action for money doesn't mean that the approval
16 here is appropriate, you still have the fair, reasonable, and
17 adequate question, right?

18 MR. FRANK: I think that's correct. I think you can
19 hypothesize a settlement --

20 JUDGE TATEL: Yes.

21 MR. FRANK: -- where the value of the injunctive
22 relief is so small, and the monetary relief given to every
23 class member is so large that no class member is left
24 lacking.

25 JUDGE TATEL: Right.

1 MR. FRANK: And in that very rare instance I can't
2 even --

3 JUDGE TATEL: So, if you look at it the way we were
4 just talking about, what's the fatal flaw here then?

5 MR. FRANK: The fatal flaw here is --

6 JUDGE TATEL: Is what?

7 MR. FRANK: -- as this Court identified in *Cobell*
8 *XXII*, not every class member is identically situated, and not
9 every class member is fairly treated by \$1,000 compensation
10 for the --

11 JUDGE TATEL: But how do we know that at this point
12 of the litigation?

13 MR. FRANK: Well, for one thing it's their burden to
14 demonstrate.

15 JUDGE TATEL: It's whose burden?

16 MR. FRANK: It's the settling --

17 JUDGE TATEL: Isn't the burden --

18 MR. FRANK: -- party's burden to demonstrate.

19 JUDGE TATEL: I thought the burden was on you here
20 to show that the District Court abused discretion in approving
21 the settlement.

22 MR. FRANK: Well, the District Court never made a
23 finding that \$1,000 would adequately compensate every single
24 class member.

25 JUDGE TATEL: Yes. Well, is there any evidence --

1 what evidence would you point to in the record that would
2 suggest -- your point as I understand it is that the risk here
3 is that some class members will be over-compensated, and
4 others under-compensated, right?

5 MR. FRANK: That's one of our complaints, yes.

6 JUDGE TATEL: Yes. So, what evidence is there that
7 that is likely to happen, or might happen? Is there any --
8 you haven't pointed to anything that --

9 MR. FRANK: Well, I disagree.

10 JUDGE TATEL: -- says it would in fact --

11 MR. FRANK: We have the lead Plaintiff's own
12 testimony before Congress about individual class members who
13 because of improper accounting lost millions of dollars. We
14 have the *Two Shields* (phonetic sp.) class action that's
15 currently pending in the Court of Claims which alleges
16 hundreds of millions of dollars that have been lost pursuant
17 to trust mis-administration. And my own client has a variety
18 of trust interests and she has no idea whether that's worth
19 \$1,000 or not, because as this Court identified in *Cobell*
20 *XXII* --

21 JUDGE TATEL: Well, is it --

22 MR. FRANK: -- you can't know whether it's worth
23 \$1,000 until --

24 JUDGE TATEL: Right.

25 MR. FRANK: -- you have the actual accounting.

1 JUDGE TATEL: But is there any -- given the
2 circumstances of this case, I understand that point, but given
3 the circumstances of this case, given *Cobell XXII*, and given
4 the fact that Congress isn't going to appropriate the money,
5 what kind of accounting could possibly, what kind of
6 accounting could be done that would possibly answer that
7 question?

8 MR. FRANK: Well, *Cobell XXII* authorized the
9 District Court to identify the low hanging fruit and create
10 subgroups within the (b)(2) class that would be entitled to an
11 accounting, and other class members, the class members with 15
12 cents in their accounts and no conceivable claim to a larger
13 account would not get an accounting.

14 JUDGE TATEL: Yes.

15 MR. FRANK: And, you know, again, this is something
16 that this Court directly addressed in *Cobell XXII*, that just
17 giving everybody a per capita payment, and that's something
18 the Government said in its briefing in *Cobell XXII*, they're
19 just simply giving everybody in the class a per capita payment
20 is one, not permissible under (b)(2), and two would be
21 arbitrary and unfair. The *Cobell XXII* didn't reach the (b)(2)
22 issue, but the Government did say that in their briefing in
23 that case. And I think *Wal-Mart* and *Ticor Title Trust*, these
24 cases identify the potential problem if you take an injunctive
25 case under (b)(2) and turn it into a monetary case.

1 JUDGE ROGERS: Of course, the whole theory here was
2 the Plaintiff's case seeking a historical accounting was so
3 they would be able to identify any amounts they were due by
4 the Government. And the District Court here looked at the
5 case somewhat differently than we've been discussing so far,
6 didn't it? And I need to know what's wrong with that. In
7 other words, the \$1,000 was not a per capita damages award --

8 MR. FRANK: Well, but --

9 JUDGE ROGERS: -- but it was consideration for
10 giving up the right to an historical accounting.

11 MR. FRANK: In my mind that's a legal, that's a
12 distinction without a legal material difference.

13 JUDGE ROGERS: Well, we all know from studying
14 property law that, you know, consideration can be very
15 different than the actual value, and I thought that was the
16 concept that the District Court was applying here.

17 MR. FRANK: Well, certainly --

18 JUDGE ROGERS: And why, if he was, why was that
19 impermissible as a matter of settlement here?

20 MR. FRANK: Because it's a (b)(2) class, and the
21 class members aren't getting to choose whether they want that
22 consideration. No class members, class members are not given
23 the opportunity to opt out that *Wal-Mart v. Dukes* considered
24 to be of constitutional importance.

25 I see that I'm running into my rebuttal time. Very

1 quickly on the standing question --

2 JUDGE TATEL: Wait, before you get to that --

3 JUDGE ROGERS: Yes. We need --

4 JUDGE TATEL: I'm sorry, I didn't mean --

5 JUDGE ROGERS: Go ahead.

6 JUDGE TATEL: -- to interrupt you.

7 JUDGE ROGERS: Go ahead.

8 JUDGE TATEL: I'm still not sure I understand --

9 well, let me ask you this, do you agree with me that whether
10 or not this is -- your client has a right to an accounting,
11 and whether this settlement is unfair, whether you look at it
12 as a certification issue or a 23(e) issue, turns on whether
13 it's, there's any way to, through an accounting to determine
14 that some members of the class are getting over-compensated,
15 others under-compensated, right? Would you agree -- let me
16 put it this way, suppose there was virtually no way to show
17 that, would you agree then that this is fair?

18 MR. FRANK: That there's no way to show it than --

19 JUDGE TATEL: Yes.

20 MR. FRANK: -- what happens then? I apologize that
21 I don't understand.

22 JUDGE TATEL: That, in other words, if it was pretty
23 clear from the record that no accounting that Congress would
24 fund would reveal the kinds of discrepancies that would make,
25 between beneficiaries it would make this unfair, would you

1 agree then that the District Court would lose its discretion?

2 MR. FRANK: I would agree that if --

3 JUDGE TATEL: Yes.

4 MR. FRANK: -- Congress announced that nobody ever
5 gets an accounting and therefore no class member could
6 possibly --

7 JUDGE TATEL: Right.

8 MR. FRANK: -- win the \$1,000 from the accounting --

9 JUDGE TATEL: Right.

10 MR. FRANK: -- then the \$1,000 would be fair in
11 that --

12 JUDGE TATEL: Well, so the reason I ask is that --

13 MR. FRANK: -- situation that we don't have.

14 JUDGE TATEL: -- in *Cobell*, I think it was 20, the
15 District Court had the '07 plan before it --

16 JUDGE ROGERS: Yes.

17 JUDGE TATEL: -- and that plan which would have cost
18 another 100 or so million dollars which nobody had, that plan
19 would have only sampled about six, only about 6,000
20 transactions would have been reconciled, which is
21 infinitesimal given the size of the class and the number of
22 transactions. I mean, that's the best I've seen so far that,
23 if possible, and even that can't be, isn't affordable. So,
24 given that what -- I mean, that if we did, if the Court
25 ordered that accounting it wouldn't produce the evidence about

1 the possible discrepancies you fear exist here, correct?

2 MR. FRANK: No. Well, we don't know.

3 JUDGE TATEL: But it wouldn't, there's no way it
4 could. I mean --

5 MR. FRANK: We don't --

6 JUDGE TATEL: -- virtually all of the beneficiaries,
7 with looking at that few number of accounts and transactions,
8 you know, 99 percent of the beneficiaries accounts wouldn't
9 even be looked at, you wouldn't know.

10 MR. FRANK: But there's still the other one percent,
11 and all it would take is one account, and one mis-transaction
12 of --

13 JUDGE TATEL: To do what?

14 MR. FRANK: -- over \$1,000.

15 JUDGE TATEL: Yes.

16 MR. FRANK: And, you know, the Supreme Court has
17 addressed this a couple of times now in *Hodel v. Irving* and
18 *Babbitt v. Youpee*, and they say we recognize this is a big
19 problem, but you don't get to skive, you don't get to knock
20 everybody out in the interests of you don't get to take the
21 procedural shortcut to resolve the problem --

22 JUDGE TATEL: I see.

23 MR. FRANK: -- and that's what happened here.

24 JUDGE TATEL: Yes. I'm --

25 JUDGE ROGERS: So, just so I'm clear, going back in

1 this case some way there was consideration of using
2 statistical modeling to develop a historical accounting, and
3 the Plaintiffs rejected that, what does that do to your
4 argument?

5 MR. FRANK: I don't think that affects my argument
6 one way or the other.

7 JUDGE ROGERS: Well, what I'm trying to get at is
8 Judge Tatel has been discussing with you the impossibility of
9 getting the type of accounting that you're thinking because of
10 the costs involved, and Congress was not, made it clear it was
11 not going to appropriate that amount of money. An earlier
12 alternative had been the notion of using statistical modeling
13 because the Department had indicated it didn't have certain
14 records, or couldn't find them. So, when this Court later
15 talked about identifying the low hanging fruit you seemed to
16 be clear what that meant, I'm not clear what that meant.

17 MR. FRANK: No. Well, I don't think anybody is,
18 but --

19 JUDGE ROGERS: All right.

20 MR. FRANK: -- I think statistical evidence could
21 show that there would be some class members that would be
22 under-compensated by the flat \$1,000 Procrustean relief here.
23 But -- and that still leaves the trust administration class,
24 which is the other *Wal-Mart* problem, and the other issues we
25 raised, even if we somehow decide that a (b)(2) class can be

1 certified for monetary relief.

2 JUDGE TATEL: What do you think of this -- one of
3 the red briefs points out that there was this study that
4 examined 99 percent of the IIM account transfers over a
5 20-year period and found no non-minor errors at all --

6 MR. FRANK: I --

7 JUDGE TATEL: -- much less they didn't find any
8 major errors at all. How do we, what do we think about that?

9 MR. FRANK: That was just, I think, for the named
10 plaintiffs. They didn't find any major errors with the named
11 plaintiffs, but maybe I'm misunderstanding the question. My
12 recollection --

13 JUDGE TATEL: Well, I ask because I didn't see a
14 response to this point in your reply brief.

15 MR. FRANK: I'll take --

16 JUDGE TATEL: Well, no, is the study, it tracked 48
17 million of the 49 million IIM transactions during a 20-year
18 period and found no evidence of any major problems.

19 MR. FRANK: And that goes to the strength of the
20 Plaintiff's claims.

21 JUDGE TATEL: No, I'm just asking since the question
22 here is whether or not an accounting is likely to produce
23 inter-class discrepancies that you're worried about, this
24 suggests that it wouldn't.

25 MR. FRANK: For any given class member, if you pick

1 a class member, are they likely to have a discrepancy, the
2 answer is no. Across the entire class that is affected and do
3 not have the choice whether or not to opt out, I think it is
4 likely that someone will have that discrepancy. But it's
5 impossible to say, again, because we have this arbitrary
6 distribution that *Cobell XXII* criticized.

7 JUDGE TATEL: Yes.

8 MR. FRANK: Very quickly on the standing, 28 U.S.C.
9 1653 permits reconciliation of any problems at the appellate
10 level should you disagree with my argument that *Devlin* and
11 Rule 23(e)(5) provide standing. I'm over my time. I hope
12 I'll get some rebuttal time, but if not, thank you.

13 JUDGE ROGERS: Yes, we'll give you a couple of
14 minutes. Thank you. Yes.

15 ORAL ARGUMENT OF THOMAS H. BONDY, ESQ.

16 ON BEHALF OF THE APPELLEES, SECRETARY OF THE INTERIOR, ET AL.

17 MR. BONDY: May it please the Court, my name is
18 Thomas Bondy. I represent the Defendants/Appellees, the
19 Secretary of the Interior, et al.

20 Your Honors, at issue here is whether the District Court
21 abused its discretion in approving the congressionally
22 authorized settlement of the *Cobell Indian Trust* case. The
23 answer to that question is no. The settlement is in all
24 respects rational and sensible, its terms are fair to the
25 members of the Plaintiff class, and in the Government's view

1 the settlement represents a significant and welcome step
2 forward in terms of Indian trust reform. Respectfully, Your
3 Honors, the judgment below should be affirmed.

4 Before turning to any of the specific issues it's also
5 important to bear in mind, Your Honors, this was an
6 extraordinary settlement even by the standards of large class
7 action settlements. This settlement by its terms in order to
8 become effective required congressional legislation, Congress
9 had to pass a statute in order to make this --

10 JUDGE ROGERS: You know, that's almost true with any
11 government settlements, so I don't think that gets you too
12 far.

13 JUDGE TATEL: Right.

14 MR. BONDY: Well --

15 JUDGE ROGERS: I mean, you know, sometimes it can be
16 paid out of, you know, a settlement fund that the Agency may
17 have, but anything significant you're going to have to get an
18 appropriation from Congress.

19 MR. BONDY: Maybe, Your Honor, but the statute here
20 doesn't just provide --

21 JUDGE ROGERS: Yes.

22 MR. BONDY: -- a large appropriation. It does other
23 significant things, too.

24 JUDGE TATEL: Yes, but look, let me just continue
25 with what --

1 JUDGE ROGERS: Yes.

2 JUDGE TATEL: -- Judge Rogers just said. Well, if
3 there were evidence that some members of the class were being
4 over-compensated and others under-compensated it wouldn't make
5 any difference how big and important the settlement is.

6 MR. BONDY: That's true, Your Honor.

7 JUDGE TATEL: Wouldn't it be unfair? Okay.

8 MR. BONDY: Your Honor, ultimately the --

9 JUDGE TATEL: So, why don't we focus on that
10 question.

11 JUDGE ROGERS: Right.

12 MR. BONDY: That's fine, Your Honor.

13 JUDGE TATEL: This Court more than anyone else knows
14 how long it's taken to get here, we got that point. *Cobell*
15 *XXII* tells us that. It's not *Cobell I*, it's not *Cobell II*,
16 it's *XXII*. We got the point.

17 MR. BONDY: Okay.

18 JUDGE TATEL: So, why don't you focus on the issue.
19 Their primary argument is this thing's unfair because, you
20 know, there's no evidence that the harm done by the Agency
21 over these years is equally spread among all the
22 beneficiaries.

23 MR. BONDY: Well, as some of the questioning --

24 JUDGE TATEL: That's --

25 MR. BONDY: -- before indicated, Your Honor, it is

1 hard to answer that kind of question in the context like this
2 with absolute precision, and that kind of precision is not
3 required. There is an element of rough justice here, but this
4 isn't random and arbitrary. The different pieces of the
5 compensation here make sense and are fair, and from our point
6 of view if I can explain are actually generous. This is more
7 than a fair settlement, it's a generous settlement. And if I
8 can go through, Your Honor --

9 JUDGE TATEL: Well, that's again not the question
10 they're raising. They're not challenging the size of the
11 settlement.

12 JUDGE ROGERS: Yes.

13 JUDGE TATEL: It's not their concern.

14 MR. BONDY: Well, if we can go through the three
15 different pieces of the compensation, Your Honor, because
16 there really are three. The way this settlement works --

17 JUDGE TATEL: It would help me if you would just
18 focus on this primary argument they make about the unfairness
19 of it that stems from their allegation that some people will
20 be over and others under-compensated.

21 MR. BONDY: Well --

22 JUDGE TATEL: And we don't know the answer to that.
23 Well, let me ask you the question this way, suppose there was
24 one member of the class who had accepted your argument about
25 how difficult the accounting is going to be, and how expensive

1 they are and how it's unlikely. Suppose one member of the
2 class had clear evidence that her account was, that the \$2,000
3 was grossly inadequate compared to the errors in her account.

4 MR. BONDY: I guess I have two reactions --

5 JUDGE TATEL: Yes.

6 MR. BONDY: -- to that, Your Honor. I understand
7 the question and I'm not trying to dodge it, but --

8 JUDGE TATEL: Yes.

9 MR. BONDY: -- it's hard to see how that scenario
10 could present itself, but in any event, I don't think that
11 makes the settlement --

12 JUDGE TATEL: Well, she's kept really good records
13 and she has proof that substantial amounts of money have
14 disappeared from her IIM account.

15 JUDGE ROGERS: Comes from a long line of --

16 JUDGE TATEL: Yes.

17 JUDGE ROGERS: -- accountants.

18 JUDGE TATEL: Yes. Exactly.

19 MR. BONDY: Well, I mean --

20 JUDGE TATEL: And she's got clear evidence, that's
21 my hypothetical.

22 MR. BONDY: I guess I have two --

23 JUDGE TATEL: She's got evidence that \$100,000 was
24 missing from this account --

25 MR. BONDY: Okay, I --

1 JUDGE TATEL: -- and a CPA has certified that.

2 MR. BONDY: Okay, fair enough. Just to be --

3 JUDGE TATEL: Now, that person's going to get

4 \$2,000, can't up that.

5 MR. BONDY: Just to be clear, Your Honor --

6 JUDGE TATEL: Yes.

7 MR. BONDY: -- we, I mean, there is a record here,

8 we are not aware of the existence of any such person.

9 JUDGE TATEL: This was a hypothetical.

10 MR. BONDY: I don't think that makes the settlement
11 fair as to the class and any person who is dissatisfied, and
12 this is crucial for due process and other reasons, any person
13 ultimately who is dissatisfied, this does retain the option of
14 opting out.

15 JUDGE TATEL: Well, not --

16 JUDGE ROGERS: Well, that's --

17 JUDGE TATEL: -- not the --

18 JUDGE ROGERS: -- not as to the first --

19 JUDGE TATEL: Right.

20 MR. BONDY: Well, as to the trust administration

21 class --

22 JUDGE TATEL: Yes.

23 JUDGE ROGERS: Yes.

24 MR. BONDY: -- that is the class that deals with --

25 JUDGE ROGERS: No, but the argument --

1 MR. BONDY: -- monetary claims.

2 JUDGE ROGERS: -- in part is that if I don't have
3 the evidence, namely an historical accounting, it's going to
4 be very difficult for me to prove my case as a member of the
5 second class, so that's why the lawsuit was brought in the
6 beginning.

7 MR. BONDY: It is why the lawsuit was brought in the
8 beginning, but also as Your Honors know, this has been
9 discussed, the reason why we are here now is it turns out that
10 the accounting project, as Your Honors know, became mired in
11 the protracted litigation, and it turns out that search, that
12 quest for a full and robust accounting was much, much more
13 complicated, and much, much more costly than anyone
14 anticipated at the outset.

15 JUDGE ROGERS: So, our analysis ought to be in the
16 realm of impossibility in that sense? I mean, given that
17 Congress had clearly stated it was not going to fund an
18 historical accounting, at least as it understood would be
19 required to grant the relief sought by the complaint.

20 MR. BONDY: Yes. I'm not sure the word
21 impossibility is the right word, but --

22 JUDGE ROGERS: Well, I'm trying to think of a
23 framework for where we're in this, as it were a black box, and
24 you could have this hypothetical, but we don't know, that's
25 what I'm getting at.

1 MR. BONDY: But also remember, Your Honor, there is
2 a compensation formula here that is key in significant part to
3 the revenues, the flow-through, if you will, of each
4 individual's IIM account. So, there's a compensation formula
5 that an irrational, admittedly rough justice kind of way, keys
6 the individual's compensation in significant part to the
7 individual's circumstances, the circumstances of the IIM
8 account.

9 JUDGE TATEL: So, you're telling me then, I guess I
10 hadn't understood this completely that take Mrs. Craven here,
11 she can protect all of her interests by opting out of the
12 trust administration class and get an accounting?

13 MR. BONDY: I wouldn't put it quite that way when
14 you said protect all of her interest, because there are two
15 classes here, one of them is not an opt-out class. Ms. Craven
16 is a member of both. She cannot opt out of the accounting
17 class, she can opt out of the --

18 JUDGE TATEL: Okay.

19 MR. BONDY: -- trust administration class.

20 JUDGE TATEL: That was my question, can she -- so,
21 she opts out, what can she do?

22 MR. BONDY: She retains whatever rights she always
23 had to file a claim against the United States for money
24 damages in the Court of Federal Claims, and has available to
25 her whatever evidentiary tools or discovery tools are

1 available in such a proceeding, and of course, the Government
2 has available to it, and whatever defenses might be available,
3 including, for example, statute of limitations. And in that
4 context the Court of Federal Claims does have a concept of
5 what it calls an accounting in aid of jurisdiction, which is
6 not the same thing as a full backward looking historical
7 accounting, but it is an accounting concept.

8 But Judge Tatel, I just want to be clear that members of
9 this class do give something up, they give up their historical
10 accounting claims. I don't want to leave any doubt about
11 that. But they can opt out of the second class, which is the
12 class for money damages, and proceed with whatever money
13 claims they think they have as they see fit in the Court of
14 Federal Claims. And I think that opt out right does answer
15 some of, a lot of the questions in this case.

16 But again, going back to the formula in the trust
17 administration class, that is a formula that tries to key
18 compensation in a significant way to the individual
19 circumstances of the particular class member based roughly on
20 the size and the duration of that person's IIM account
21 activity.

22 JUDGE TATEL: Does the Government still believe that
23 Mrs. Craven lacks standing?

24 MR. BONDY: Well, I'm not sure we ever believed it
25 to the extent you put it that way. Let me explain, Your

1 Honor, and this was really limited to a footnote in our brief,
2 as we read the blue brief, the Craven Appellant's brief, we
3 thought that what she was saying in part, not in whole, in
4 part, is that the settlement is unfair because it is unfair to
5 other people, not to her. We understood her to be saying
6 that, and our very limited modest point on standing --

7 JUDGE TATEL: I see.

8 MR. BONDY: -- is we don't --

9 JUDGE TATEL: Right.

10 MR. BONDY: -- think she has standing to make that
11 claim, that's all we're saying. Of course she has standing to
12 assert her own rights and perceived injuries to herself, of
13 course she does.

14 JUDGE ROGERS: Of course, one of her arguments, not
15 arguments, but -- is that she didn't opt out so she'd be in a
16 position to make the arguments she's making today.

17 MR. BONDY: And that's fine, but she could make the
18 arguments on behalf of herself. She can't point to other
19 people who are not in her circumstances, who could have
20 objected but did not, who could have opted out but did not,
21 and who could have appealed and did not, and argue here that
22 the settlement is unfair because it's unfair to those people.
23 She doesn't represent those people, she represents herself,
24 and I think that's a very limited modest point, that's our
25 only point --

1 JUDGE TATEL: Okay.

2 MR. BONDY: -- on standing. And we're not trying to
3 foreclose this Court's inquiry into the overall fairness of --

4 JUDGE TATEL: Okay.

5 MR. BONDY: -- the settlement.

6 JUDGE TATEL: Okay. Let me just, I'm going to ask
7 you the same question I asked Mr. Frank, are we dealing with a
8 certification issue, or a fairness question?

9 MR. BONDY: Both, Your Honor. I think both are
10 presented. The certification of the trust administration
11 class is --

12 JUDGE TATEL: No, the historical class.

13 MR. BONDY: I'm not --

14 JUDGE TATEL: I'm sorry. I'm only talking about the
15 historical class.

16 MR. BONDY: Okay, Your Honor. I'm not sure the
17 certification of that class is directly presented. It's a bit
18 hard to tell, in some respect maybe that question and the
19 fairness question are wrapped up together. But, I mean, the
20 Craven brief directly attacks the certification of the second
21 class, the TAC. But we don't -- to go back to the beginning
22 of the oral argument, Your Honor, we certainly think that a
23 (b)(2) class for injunctive relief can be settled for a flat
24 money payment, and if that were not true you'd have a lot of
25 cases like this one, cases for injunctive relief that become

1 mired in litigation, that people reasonably want to settle and
2 can't settle because really in any cases the practical way to
3 settle it will be just for a flat money payment to release the
4 injunctive claims. And it can't be that, in a reasonable
5 sense the parties can't get together and do that.

6 Your Honors, I know that my red light is on, unless the
7 Court has any further questions I have nothing more.

8 JUDGE ROGERS: Thank you.

9 MR. BONDY: Thank you.

10 JUDGE ROGERS: Good morning.

11 ORAL ARGUMENT OF ADAM H. CHARNES, ESQ.

12 ON BEHALF OF THE APPELLEES COBELL, ET AL.

13 MR. CHARNES: Good morning, may it please the Court,
14 I'm Adam Charnes and I represent the Plaintiff class.

15 Maybe to start, Judge Tatel, with one of the questions
16 you asked again at the end, I believe that there are two
17 separate questions that Mrs. Craven muddles together with
18 respect to historical accounting class, and the first question
19 is whether the historical accounting class was properly
20 certified, and then if it was the second question is whether
21 it's fair under Rule 23(e). And in that regard on the first
22 question it's important to note that this class essentially
23 was certified 15 years ago in 1997. The amended complaint
24 that was filed made minor modifications to the scope of the
25 class in order to conform with decisions of this Court and the

1 District Court, for example, direct pay beneficiaries were
2 removed from the class in accord with prior decisions. But
3 otherwise the class was certified 15 years ago. So, we simply
4 don't believe that *Wal-Mart's* holding has anything to say
5 about that. As you noted at the beginning, the historical
6 accounting class seeks solely injunctive relief, it fits
7 comfortably under (b)(2). It also fits, and this wasn't
8 addressed earlier this morning, under (b)(1)(A). The fact of
9 the matter is that --

10 JUDGE TATEL: So, you see this question then as
11 whether or not the District Court finding in *Farris* (phonetic
12 sp.), that's the key question, right?

13 MR. CHARNES: Well --

14 JUDGE TATEL: Whether it's -- so, Plaintiffs can
15 settle injunctive actions for money, and, which is what
16 happened here, but -- so, that's just a question to 23(e),
17 right? Is --

18 MR. CHARNES: I think that --

19 JUDGE TATEL: -- it fair?

20 MR. CHARNES: I think that's right.

21 JUDGE TATEL: So, what's your answer to the argument
22 that, without an accounting, there's no way of knowing whether
23 this is equally fair to all members of the class?

24 MR. CHARNES: Well, I think there are several
25 responses. First of all there has been done a great deal of

1 work with the existing data, analyzing that data to determine
2 whether there are significant accounting errors. And
3 Plaintiffs, the class has diligently attempted to show over
4 the course of 15 years that there were significant accounting
5 errors. But the fact of the matter is that heretofore we've
6 been largely unable to convince the District Court that that
7 is the case. Your Honor referred to the study, we discussed
8 it at page 29 of our brief, where the Government studies
9 almost 50 million transactions, and the Government expert
10 found only incredibly minor errors. In fact, Judge Robertson
11 in *Cobell XXI* said that despite the plethora of evidence that
12 this trust has been mismanaged for a century or more than a
13 century, that there, as he put it, there has been essentially
14 no direct evidence of funds missing from the trust. So, the
15 evidence that exists now contradicts Craven's argument.

16 And I think it's important to note a point that I think
17 both you and Judge Rogers made at the beginning, which is that
18 this is an appeal, and Mrs. Craven is an Appellant, and she
19 needs to prove an abuse of discretion by the District Court in
20 finding the settlement to be fair. And it's her obligation if
21 she's making an assertion of interclass conflict to come
22 forward with evidence of that, and we cite in our briefs
23 several circuits have made that point. You can't come in and
24 hypothesize that there may be an interclass conflict, that
25 there may be class members out there who are benefitting, and

1 maybe some that are disadvantaged. And in fact, her argument
2 is, I think if I read her blue brief correctly, she concedes
3 that, of course, there's going to be some variation in class
4 members, but her argument is premised on dramatic differences,
5 some class members wildly over-compensated, and some wildly
6 under-compensated, and that somehow creates a conflict, but we
7 don't know that that exists. In fact, all the evidence that
8 has been tendered so far has been that that doesn't exist.
9 And Judge Robertson certainly didn't think that existed.

10 Moreover, as we argue in our brief, we don't think that
11 creates interclass conflict anyway because we don't know, any
12 particular class member doesn't know which category he or she
13 is in, and we discussed the *Ewell* (phonetic sp.) case from the
14 Seventh Circuit which makes the point that if you don't know
15 which category you're in the disadvantage is there can't be an
16 interclass conflict.

17 JUDGE TATEL: Well, but that, I don't think that
18 really helps you because, you know, if an accounting could in
19 fact identify different classes, of the class, the fact that
20 you don't know which one you're in before the accounting has
21 been done doesn't really get you very far.

22 MR. CHARNES: Well, but here --

23 JUDGE TATEL: I mean, your argument as I understood
24 is that there's no accounting possible that could even
25 determine it.

1 MR. CHARNES: Well, in *Ewell*, the Seventh Circuit
2 case, eventually everybody knew which category they were in.
3 That was the case where the railroad laid fiber on one side of
4 the railroad tracks or another, but when the case was settled
5 land owners didn't know which side the fiber would be on, and
6 therefore the Court held that there was no conflict. But
7 you're absolutely right, it's crystal clear under *Cobell XXII*
8 there is never going to be a meaningful accounting for this
9 class --

10 JUDGE TATEL: Right.

11 MR. CHARNES: -- both as a result of *Cobell XXII* --

12 JUDGE TATEL: So what did the Court mean by low
13 hanging fruit?

14 MR. CHARNES: Your Honor, I don't know. I think
15 that's a question for you.

16 JUDGE TATEL: I wasn't -- never mind.

17 MR. CHARNES: But even more important --

18 JUDGE TATEL: Well, what do you think it meant?

19 JUDGE ROGERS: What do you think it might have
20 meant? Counsel suggested maybe the Court had in mind
21 subclasses, and that type of thing.

22 JUDGE TATEL: Right.

23 MR. CHARNES: I don't -- I know Mr. Frank mentioned,
24 wrote that in his reply brief. I think, I don't read *Cobell*
25 *XXII* as at all suggesting there are separate classes or

1 subclasses that should be created. I think what this Court
2 probably meant was that the easy data to analyze should be
3 analyzed to see whether there are any mistakes in there. Part
4 of the problem with that is number one, the easy data have
5 already been analyzed, and which Judge Robertson found --

6 JUDGE TATEL: Is that the study you were just
7 talking about, the 20-year study?

8 MR. CHARNES: Among other things, that's correct.

9 JUDGE TATEL: Yes. Yes.

10 MR. CHARNES: And moreover, even that, even analysis
11 of the low hanging fruit is, this is important, is critically,
12 is dependent upon congressional appropriation. So, if
13 Congress appropriates \$100 for the accounting under *Cobell*
14 *XXII*, that's sufficient. Moreover, we can't forget that the
15 vast majority of records for this trust have been destroyed,
16 so --

17 JUDGE ROGERS: See, that's why I frame this in terms
18 of trying to think about it in terms of impossibility. Not
19 only are records lost, the Department changes its method of
20 accounting on two different occasions. Even if Congress said,
21 you know, here's an open bank account, do the accounting, at
22 some point you're going to be into statistical modeling, and
23 the Plaintiffs rejected that approach early on.

24 MR. CHARNES: That's right.

25 JUDGE ROGERS: So, where are we in a sense?

1 MR. CHARNES: So, and that's precisely why the
2 settlement for the historical accounting class was established
3 the way it was, it's a \$1,000 payment that is not restitution
4 to compensate class members for errors in their accounts. But
5 it is instead a payment to buy from them, essentially to
6 purchase from class members, the right to an accounting. It's
7 true the District Court, Judge Hogan did at one point from the
8 bench refer to this as a restitutionary type of relief, it's
9 clear that from the context of his analysis that that's not a
10 precise description; I don't think that's what he meant, that
11 it was restitution, and that's not how the settlement is
12 structured. It's not meant to say that on average class
13 members are disadvantaged by \$1,000, or most, or some, it's
14 simply purchasing from them the right, the Government's
15 obligation, to do an accounting for everybody. And it's not
16 possible, as Mr. Frank suggested, for a particular class
17 member to stand up and say I'd like an accounting, that's why
18 there's no opt-out. This is a co-mingled unitary trust, it's
19 not possible for one class member, or 10 class members to say
20 well, just do an accounting for my funds, because the money
21 for all class members was held in common, was co-mingled and
22 was, we alleged, in the amended complaint, the initial was
23 mismanaged in common.

24 JUDGE ROGERS: Well, explain to me a little, very
25 briefly, what did the named Plaintiffs receive?

1 MR. CHARNES: Thank you for raising that, Your
2 Honor, that's an important point. In, I believe for the first
3 time, in the reply brief Mrs. Craven says well, the named
4 Plaintiffs suffered no losses, and they -- because they
5 received an accounting, and the accounting that they received
6 showed that they were minimal losses, and that's not accurate.
7 And if I could have a minute just to describe the background
8 because I think it will take a few seconds to describe this.
9 In the District Court's initial discovery order it ordered the
10 Government to produce all trust records related to the named
11 Plaintiffs and their predecessors and interests, and the
12 Government had a difficult time doing that. Ultimately, in
13 satisfaction of that obligation they produced a report, which
14 was referred to as the Rosenbaum Report, which analyzed, or
15 attempted to analyze the named Plaintiffs' IIM account records
16 to the extent that they existed. When that expert report was
17 produced to the Plaintiffs, Plaintiffs' counsel was concerned
18 that the Government was going to take the position that Mr.
19 Frank now takes, which is that was a full accounting under the
20 '94 Act, and the Plaintiffs filed a motion with the District
21 Court asking for a trial to be held on the adequacy of that
22 accounting, and the Government then took the position that no,
23 no, no, that was not an accounting satisfying the Government's
24 obligation to account, but it was just an expert report. And
25 the reason I suppose the Government did that is that there

1 were severe problems with the analysis of the named
2 Plaintiffs. For one of the named Plaintiffs the Government
3 cannot find any IIM trust records at all, for the other named
4 Plaintiffs they conceded that about one-seventh of all of the
5 accounting, all of the transactions were not backed up by
6 documents, and what Mr. Rosenbaum did was he basically did a
7 bookkeeping exercise, he found a piece of paper that said \$30
8 should have been credited to the trust account, and he went to
9 the trust account and said look, there's \$30 there, but he
10 never verified that \$30 was the right amount, he never
11 verified that \$30 was supposed to go to say Mrs. Cobell's
12 account as opposed to somebody else's account.

13 JUDGE ROGERS: So, your position is even, and I
14 gather the Government's position, even for that period of time
15 as to those limited number of members of the class it has been
16 impossible to prepare an historical accounting.

17 MR. CHARNES: That's exactly right, Your Honor.

18 JUDGE ROGERS: Yes. Yes.

19 MR. CHARNES: I see that my time has expired. If
20 there are no further questions, thank you.

21 ORAL ARGUMENT OF THEODORE H. FRANK, ESQ.

22 ON BEHALF OF THE APPELLANT

23 MR. FRANK: Very quickly. They say that it's
24 impossible to provide non-unitary relief for the accounting,
25 but then they acknowledge that the named Plaintiffs got their

1 own accounting. It may not have been a complete historical
2 accounting, but they got a much better accounting than any
3 other class member got, and that's why this case is not like
4 *Ewell*. In *Ewell*, the named Plaintiffs were in the same veil
5 of ignorance as the rest of the class, here the named
6 Plaintiffs knew where they stood, and knew what they could
7 prove and what they could not prove within themselves.

8 Mr. Charnes says that this is not restitution, but that
9 is not what the Plaintiff said below, and that's why the
10 District Court found it to be restitution, he was asked to
11 find it to be restitution by the Plaintiffs. Yes, this is
12 reviewed on abuse of discretion, but if the District Court
13 applies the wrong standard of law that is an abuse of
14 discretion, and we've identified several different areas where
15 we think the District Court committed an error of law.

16 With respect to the formula, I think that is important --

17 JUDGE ROGERS: So, could I just be clear, and maybe
18 everybody else understands this. If in this situation where
19 it is impossible for the Government to prepare an historical
20 accounting for each member of the class, any settlement that
21 gives up that right is necessarily unfair?

22 MR. FRANK: No. Any (b)(2) settlement that --

23 JUDGE ROGERS: Any (b)(2) settlement is necessarily
24 unfair?

25 MR. FRANK: That's correct. We take the position

1 that there needs to be re-certification under (b)(3).

2 JUDGE ROGERS: I see. All right.

3 MR. FRANK: And that's why you --

4 JUDGE TATEL: By the way, why would that -- I mean,
5 that wouldn't solve anything. The Government wouldn't agree
6 to that, right? Why would the Government agree to a deal
7 whereby individual Plaintiff's can opt out and still seek a
8 historic accounting? I mean, I think the more candid answer
9 to Judge Rogers' question you might have given is that it
10 can't be settled for giving up the historic accounting, right?

11 MR. FRANK: Well, if the --

12 JUDGE TATEL: I mean, if you were advising the
13 Interior Department you wouldn't advise them to -- they don't
14 even need to a lawyer to know not to sign that deal, right?

15 MR. FRANK: Well, if the Interior Department thinks
16 that they can't offer enough to the class that nobody would
17 opt out from the historical accounting rights --

18 JUDGE TATEL: Well, see, your point then, your real
19 point is that this case can't be settled.

20 MR. FRANK: No, the case can be settled, it has to
21 be a settlement that --

22 JUDGE TATEL: Without an accounting, that's your
23 point. Because either -- I think that's what you're saying.

24 MR. FRANK: Well, the case can be settled --

25 JUDGE TATEL: It can't be settled without an

1 historic accounting.

2 MR. FRANK: The case can be settled, for example, if
3 the parties could agree to the scope of the injunctive relief.

4 JUDGE TATEL: What does that mean? You mean for
5 less of a historic accounting?

6 MR. FRANK: They could agree what the low hanging
7 fruit is.

8 JUDGE TATEL: But -- they could agree to the low
9 hanging fruit, but --

10 JUDGE ROGERS: Is that the same as what Judge
11 Tatel's question --

12 JUDGE TATEL: Yes. None of us know what that means.

13 MR. FRANK: Well, that's --

14 JUDGE TATEL: I don't know what it means.

15 MR. FRANK: -- why it would --

16 JUDGE TATEL: I mean, we've got --

17 MR. FRANK: I mean --

18 JUDGE TATEL: The best deal I've seen is the '07
19 historic accounting. I haven't seen anything in there that
20 looks any more practical, even that isn't affordable. But
21 that as I said to you when we were first talking wouldn't
22 reveal anything about interclass discrepancies.

23 MR. FRANK: Well, there was a settlement before
24 Congress in 2006, 2007 to provide \$7 billion to perform --

25 JUDGE TATEL: But Congress --

1 MR. FRANK: -- substantial historical accounting --

2 JUDGE TATEL: -- Congress won't pay for it.

3 MR. FRANK: -- and compensation. What?

4 JUDGE TATEL: Congress won't pay for it.

5 MR. FRANK: Well, the earlier settlement is one that
6 the Plaintiffs rejected rather than Congress rejected. But --
7 and, you know, maybe at this -- I mean, we can't judge this
8 based on what a future Congress may or --

9 JUDGE TATEL: No, but I think --

10 MR. FRANK: -- may not do.

11 JUDGE TATEL: Okay. Now you're getting more candid.
12 Right. I mean, you really are saying that this case can't be
13 settled without an adequate historic accounting, and
14 Interior's obligation here, or at least the Plaintiffs have
15 the right to tell Interior to go back to Congress, right?

16 MR. FRANK: I mean, I think Interior can say we are
17 going to offer enough money and talk to the people who want to
18 opt out and convince them that they shouldn't opt out, that
19 it's in their best interests to agree to the settlement and
20 offer the historical accounting class a (b)(3) settlement.

21 JUDGE TATEL: You mean just the people who object
22 would get the historic accounting?

23 MR. FRANK: I don't -- Well, I mean, the people who
24 object are going to have to go and bring their own Section
25 4011 claim, they'll have to find a lawyer to do that, and

1 they'll have to go against the Department of Interior's
2 defenses.

3 JUDGE TATEL: But every case --

4 MR. FRANK: And -- go ahead.

5 JUDGE TATEL: But all the recent decisions in this
6 case say under the circumstances an historic accounting is not
7 possible. An historic accounting that would provide the
8 information you, seems to me, quite properly want. But the
9 record of this case suggests that's not going to happen.

10 MR. FRANK: Well --

11 JUDGE TATEL: And you're telling me that that still
12 means that this case can't be settled without the impossible
13 historic accounting, so it can't be settled.

14 MR. FRANK: If this Court overrules *Cobell XXII* and
15 says that an historical accounting is impossible, which they
16 rejected the District Court's finding of that and said no, no,
17 some historical accounting --

18 JUDGE TATEL: No, no, no.

19 MR. FRANK: -- is possible --

20 JUDGE TATEL: Yes. The question though is, there's
21 no question, you're absolutely right about that, some historic
22 accounting is possible. The question is whether an historic
23 accounting is possible, whether the historic accounting that
24 is possible is one that would yield the information that you
25 are looking for, and I don't see that in this record.

1 MR. FRANK: And again --

2 JUDGE TATEL: That's my problem.

3 MR. FRANK: -- we're relying on what this Court has
4 already found in *Cobell* --

5 JUDGE TATEL: Okay.

6 MR. FRANK: -- XXII.

7 JUDGE TATEL: All right.

8 MR. FRANK: If the Court wants to make a different
9 finding, different results certainly occur.

10 JUDGE TATEL: Okay.

11 JUDGE ROGERS: All right.

12 MR. FRANK: With respect to the formula that the
13 parties are relying on, I think that's very important to the
14 idea of over-compensation and under-compensation. My client
15 who gets \$1,000 a year from her trust account is entitled to
16 \$1,400 or so from this formula, a class member with 10 cents a
17 year from their trust account is entitled to \$800 under this
18 formula. And as we documented, my client believes that she
19 has valid trust administration claims that are being wiped out
20 by this settlement. I'm happy to take any other questions you
21 have. I think there are other errors of law, such as the
22 23(a)(4) issue, and I'm happy to answer your questions. If
23 not, thank you.

24 JUDGE TATEL: I don't have any more questions.

25 JUDGE ROGERS: Okay. No, thank you very much,

1 Counsel.

2 MR. FRANK: Thank you, Your Honor.

3 JUDGE TATEL: Yes.

4 JUDGE ROGERS: All right. We will take the case
5 under advisement.

6 (Recess.)

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DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.



Paula Underwood

February 28, 2012

DEPOSITION SERVICES, INC.