[ORAL ARGUMENT SCHEDULED FOR MAY 15, 2012]

No. 11-5270, 11-5271, 11-5272

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

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

CAROL EVE GOOD BEAR, CHARLES COLOMBE,
and MARY AURELIA JOHNS,
Objectors-Appellants,

v.

KENNETH LEE SALAZAR, *et al.*,
Defendants-Appellees,

Appeal from the United States District Court for the District of Columbia
No. 1:96-CV-1285, the Honorable Thomas F. Hogan, District Judge

INITIAL BRIEF OF PLAINTIFFS-APPELLEES

Dennis M. Gingold
THE LAW OFFICE OF DENNIS M. GINGOLD
607 14th Street, N.W., 9th Floor
Washington, D.C. 20005
Telephone: (202) 824-1448

William E. Dorris
Elliott Levitas
KILPATRICK TOWNSEND & STOCKTON LLP
1100 Peachtree Street, Suite 2800
Atlanta, Georgia 30309
Telephone: (404) 815-6500

Adam H. Charnes
David C. Smith
Richard D. Dietz
KILPATRICK TOWNSEND & STOCKTON LLP
1001 W. Fourth Street
Winston-Salem, North Carolina 27101
Telephone: (336) 607-7300

Keith M. Harper
Michael Alexander Pearl
KILPATRICK TOWNSEND & STOCKTON LLP
607 14th Street, N.W.
Washington, D.C. 20005
Telephone: (202) 508-5844

Counsel for Plaintiffs-Appellees

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

All parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Objectors-Appellants.

B. Rulings Under Review

All rulings under review appear in the Brief for Objectors-Appellants.

C. Related Cases

All related cases appear in the Brief for Objectors-Appellants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

[*] Authorities upon which Plaintiffs chiefly rely are marked with asterisks

Statutes and Rules

Other Authorities

GLOSSARY

CRA	Claims Resolution Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064
IIM	Individual Indian Money
App.	The parties' deferred joint appendix
Obj. Br.	Objectors-Appellants' opening brief

INTRODUCTION

This landmark class settlement arises out of a painful period in American history. One hundred and twenty-five years ago, the United States, in an effort to destroy tribal governments and forcibly assimilate Indians into American society, seized tribal land west of the Mississippi River and allotted it to enrolled members of those tribes. The government held legal title to such allotted lands as trustee for individual Indians in the Individual Indian Money Trust ("IIM Trust"). Income collected by the government's trustee delegates from their sale and lease of IIM Trust lands, including revenue from oil, natural gas, coal, and timber, has been commingled, held in common in the United States Treasury and invested in common in U.S. government securities and federally insured deposits. Ultimately, all such funds were required to be disbursed to the beneficiaries of the IIM Trust.

Sadly, however, the government's management of the IIM Trust has been replete with loss, dissipation, theft, waste, and wrongful withholding of funds. Indeed, this Court has described the government's mishandling of the IIM Trust as "a serious injustice that has persisted for over a century and that cries out for redress." *Cobell v. Kempthorne* (*Cobell XIX*), 455 F.3d 317, 335 (D.C. Cir. 2006). To redress this injustice, Plaintiffs brought this class action in 1996 seeking declaratory and injunctive relief to compel the United States to conduct a full historical accounting of all IIM Trust funds, to correct and restate IIM account

balances, to fix broken IIM Trust management systems, and to undertake other trust reform measures to ensure prudent trust management.

The lawsuit and Plaintiffs' historic settlement with the government are unique. This intensely litigated case has lasted for more than fifteen years, involving over 3,900 district court docket entries; 250 days of hearings and trials; twelve prior appeals to this Court, including ten interlocutory appeals; and over 80 published opinions, including ten opinions of this Court. Three district judges have presided over these proceedings. Further, the record is massive, involving thousands of exhibits entered into evidence and trial testimony from two Interior secretaries, two assistant Treasury secretaries, and one Interior inspector general, as well as trial and deposition testimony from numerous experts, including accounting, oil and natural gas, coal, timber, hard rock mineral, statistics, economics, IT security, restitution, and trust experts.

In December 2009, the parties reached an unprecedented $3.4 billion settlement, including $1.9 billion in furtherance of Trust reform and $1.5 billion in direct payments to class members. All three branches of the government approved the settlement: Congress, exercising its plenary power in relation to Indian affairs, "authorized, ratified, and confirmed" it through bipartisan legislation; the President signed that legislation with an accompanying statement of support; and the district court found the settlement to be fair, reasonable, and adequate after a full hearing.

Given the unique nature of the IIM Trust, the intensity and duration of the litigation, and the legislation approving this settlement, there is no other case like this one and there likely never will be.

Objectors-Appellants Carol Good Bear, Charles Colombe, and Mary Johns—three objectors out of 500,000 Indian trust beneficiaries—ask this Court to ignore the adversarial nature of these proceedings and the findings of Congress, the President, and the district court; to override the decisions of 99.98% of class members who neither objected to this settlement nor opted out; and to veto the considered judgment of the class representatives and class counsel who have litigated this case since June 10, 1996. Objectors' arguments—which at best are cursory and garbled—are factually and legally wrong. The district court had jurisdiction to approve the settlement; the district judge was not required to recuse himself from the fairness hearing; the class certification and settlement in this case are consistent with Supreme Court precedent; and the court plainly did not abuse its discretion in finding this settlement to be fair, reasonable, and adequate. The Court should reject Objectors' arguments and affirm the district court's judgment.

JURISDICTIONAL STATEMENT

Objectors assert that "[t]he district court took jurisdiction of the amended complaint below pursuant to the Claims Resolution Act of 2010, Pub. Law No. 111-291, 124 Stat. 3064 (2010)." (Obj. Br. 1.) The CRA provided jurisdiction

over the Trust Administration Class claims. The district court had jurisdiction over the Historical Accounting Class claims pursuant to 28 U.S.C. §§ 1331 and 1361.

STATEMENT OF THE FACTS

I. HISTORY OF THE INDIVIDUAL INDIAN MONEY TRUST

This Court explained the history of the IIM Trust in *Cobell v. Norton* (*Cobell VI*), 240 F.3d 1081 (D.C. Cir. 2001). Below, Plaintiffs provide a brief summary of the relevant facts.

In the late nineteenth century, the federal government adopted a policy of assimilation for Indians. To further that policy, the government seized tribal reservation land and, in part, divided it into parcels allotted to individual Indians. *Id.* at 1087; General Allotment Act, ch. 119, 24 Stat. 388 (1887).

The United States retained legal title to the allotted lands and, as trustee for individual Indians, exercised complete control over those lands and their resources, including oil, natural gas, coal and timber. *Cobell VI*, 240 F.3d at 1087. Individual Indian beneficiaries could not sell or lease their land. *Id*. By exercising control as trustee of individual Indian property, the United States assumed enforceable trust duties and "charged itself with moral obligations of the highest responsibility and trust." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942); *see also Mitchell v. United States*, 463 U.S. 206, 226 (1983).

Despite the government's fiduciary obligation to individual Indians, the history of the IIM Trust is replete with the loss, dissipation, theft, waste, and wrongful withholding of Trust funds. As early as 1914, Congress learned that "[t]he Government itself owes millions of dollars for Indian moneys which it has converted to its own use." Bureau of Mun. Research, 63rd Cong., *Report to the Joint Commission to Investigate Indian Affairs: Business and Accounting Methods Employed in the Administration of the Office of Indian Affairs* 2 (Comm. Print 1915) ("*1915 Report*"). Misappropriation and mismanagement continued into modern times. In *Cobell VI*, this Court noted that "[t]he General Accounting Office, Interior Department Inspector General, and Office of Management and Budget, among others, have all condemned the mismanagement of the IIM trust accounts over the past twenty years." *Cobell VI*, 240 F.3d at 1089; *see generally* Comm. on Gov't Operations, *Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund*, H.R. Rep. No. 102-499 (1992) ("*Misplaced Trust*").

Further compounding these problems, the full scope of the government's mismanagement remained hidden from individual Indian beneficiaries because, as a matter of policy, they were not furnished statements of account and "[n]o real accounting, historical or otherwise, has ever been done of the IIM trust." *Cobell v. Kempthorne* (*Cobell XX*), 532 F. Supp. 2d 37, 43 (D.D.C. 2008).

II. THE TRUST REFORM ACT

A century of complaints by Indians and "many years of congressional frustration over Interior's handling of the IIM trust," *id.* at 41, led to passage of the American Indian Trust Fund Management Reform Act of 1994 ("Trust Reform Act"), Pub. L. No. 103-412, 108 Stat. 4239. It confirmed and codified the government's pre-existing fiduciary duty to provide a full accounting to IIM Trust beneficiaries. *Cobell VI*, 240 F.3d at 1090.

Plaintiffs brought this class action in 1996, after the government failed to begin the accounting mandated by the Trust Reform Act and required by the government's pre-existing fiduciary duties. In 1999, the district court found the Interior and Treasury Departments in violation of the Trust Reform Act and held them in breach of their trust duties to Plaintiffs. *Cobell v. Babbitt* (*Cobell V*), 91 F. Supp. 2d 1, 58 (D.D.C. 1999). The district court granted declaratory relief, ordered the Interior and Treasury Secretaries as trustee-delegates "to provide plaintiffs an accurate accounting of all money in the IIM trust," and established a plan for compliance. *Id.* This Court affirmed the court's order. *Cobell VI*, 240 F.3d at 1110.

III. NATURE AND SCOPE OF THE TRUST ACCOUNTING

One of the central issues in this action has been the scope of an accounting applicable to the IIM Trust. In 2008, the district court held that it is "clear that . . .

the required accounting is an impossible task" and concluded that "the Department of the Interior has not—and cannot—remedy the breach of its fiduciary duty to account for the IIM trust." *Cobell XX*, 532 F. Supp. 2d at 39, 103. Based on that decision, the court conducted an evidentiary hearing to determine the nature and scope of restitutionary relief to remedy the government's breach of trust. Following that hearing, the court ordered the United States to pay class members $455.6 million in restitution for IIM Trust funds improperly withheld. *Cobell v. Kempthorne* (*Cobell XXI*), 569 F. Supp. 2d 223 (D.D.C. 2008).

On interlocutory appeal, this Court rejected the district court's conclusion of legal impossibility, holding that Interior must provide an accounting. *See Cobell v. Salazar (Cobell XXII)*, 573 F.3d 808, 812-13 (D.C. Cir. 2009). However, this Court denied Plaintiffs a full historical accounting, which traditional trust-law principles would mandate. Instead, the Court concluded that the government must undertake only "the best accounting possible, in a reasonable time, with the money that Congress is willing to appropriate." *Id.* at 813. The Court also instructed that, during such an accounting, Interior need only "concentrate on picking the low-hanging fruit." *Id.* at 815.

Although Plaintiffs maintain that they are entitled to a full historical accounting of "all funds" since the inception of the IIM trust, *see Cobell VI*, 240 F.3d at 1090, and to adverse inferences and presumptions should the government

be unable to document its conduct as well as all Trust assets and transactions, *Cobell XXII* in many ways stymied Plaintiffs' request for full injunctive and declaratory relief. Under this Court's holding, class members no longer are guaranteed to receive any accounting—even if they prevail in this litigation—because Congress could decline to appropriate sufficient (or any) funds or the Interior Secretary could deprioritize the accounting.

Although *Cobell XXII* dramatically limited the accounting Plaintiffs could hope to obtain in this lawsuit, it did not end the litigation. Both parties expected the lawsuit to drag on for many more years. Indeed, this Court acknowledged in *Cobell XXII* that "our precedents do not clearly point to any exit from this complicated legal morass." 573 F.3d at 812. As a result of these litigation realities and increasing pressure on the government to find a solution to this protracted and costly lawsuit, the parties renewed serious settlement discussions.

IV. THE SETTLEMENT AGREEMENT

For five months, the parties engaged in intensive and contentious negotiations. On December 7, 2009, they executed a settlement agreement contingent upon authorizing legislation and the district court's approval. The amended complaint filed pursuant to the Settlement Agreement created two classes. The Historical Accounting Class consists (with certain modifications, (Dkt. # 3660 at 9-10)) of the class originally certified by the district court on

February 4, 1997 (Dkt. # 27 at 1-3), which seeks injunctive and declaratory relief including an accounting and necessary Trust reform. (Dkt. # 3660-2 at 12.) The Trust Administration Class consists of class members with claims against the government for mismanagement of their IIM Trust assets. (*Id.* at 16.)

The settlement allocates $1.9 billion for the Trust Land Consolidation Fund. (*Id.* at 17.) Interior must use those funds to purchase highly fractionated Trust interests at market rates. (*Id.*) These fractionated interests resulted when allotments were continuously divided among the original beneficiaries' descendants over many generations. The difficulty of accounting for these interests and the revenue generated therefrom is a major factor in the government's mismanagement of the IIM Trust. *Cobell XX*, 532 F. Supp. 2d at 41. Thus, consolidating these interests is necessary to achieve meaningful Trust reform and for prudent Trust management.

In addition, each member of the Historical Accounting Class receives a payment of $1,000, totaling approximately $337 million. This payment is in lieu of an historical accounting through September 30, 2009, the record date of the Settlement; it is not compensation for accounting errors and it does not relieve the government of its current and future accounting duties. Nor is the $1,000 payment compensation to the Historical Accounting Class for the government's mismanagement of IIM Trust assets. Compensation for trust mismanagement is

provided to the Trust Administration Class.[1] The Historical Accounting Class is certified under Rule 23(b)(1)(A) and 23(b)(2) of the Federal Rules of Civil Procedure. Historical Accounting Class members are not permitted to opt out. (Dkt. # 3660-2 at 21.)

The settlement also provides for payments to the Trust Administration Class. Class members receive a baseline payment of approximately $800[2] plus an additional amount calculated from the ten highest-revenue years in each class member's IIM account. The Trust Administration Class payments total approximately $1.1 billion. The class is certified under the Claims Resolution Act of 2010, described below, and alternatively under Rule 23(b)(3) of the Federal Rules of Civil Procedure. Trust Administration Class members may opt out.[3] (*Id.* at 21-22.)

Finally, the settlement created the Indian Education Scholarship Fund to help Indian students "defray the cost of attendance at both post-secondary

[1] All members of the Historical Accounting Class are also members of the Trust Administration Class.

[2] The Settlement Agreement provided for a payment of $500, but the Claims Resolution Act increased that amount by approximately $300 and the parties amended the Agreement accordingly. (Dkt. # 3660-2 at 30-31; Dkt. # 3660-12 at 3-4, 10; Dkt. # 3660-19 at 8.)

[3] Payments to both classes are exempt from federal income taxation and are excluded from income for purposes of means-tested federal entitlement programs. CRA § 101(f)(1)-(2).

vocational schools and institutions of higher education." (*Id.* at 40.) The Scholarship Fund will receive up to $60 million from the Trust Land Consolidation Fund, to encourage class members to participate in the land consolidation program. It will also receive unclaimed funds after all payments are made to the Historical Accounting and Trust Administration Classes. (*Id.* at 41-42.)

V. THE CLAIMS RESOLUTION ACT OF 2010

The settlement required congressional approval and, shortly after the parties executed the settlement agreement, legislation authorizing and appropriating the settlement was introduced in Congress. However, debate on that legislation lasted more than a year. Because Congress did not act within the time frame specified in the original settlement agreement, the parties were forced to return to the district court on several occasions to provide a status update and amend the Settlement Agreement to provide additional time for Congress to act.

Finally, on November 30, 2010, Congress enacted the Claims Resolution Act of 2010 ("CRA"), Pub. L. No. 111-291, 124 Stat. 3064. On December 8, 2010, the President signed the Act into law. The CRA appropriated funds to implement the Settlement Agreement and provided that "[t]he Settlement is authorized, ratified, and confirmed." CRA § 101(c)(1). Because under existing law certain Trust Administration Class claims must be brought in the Court of Federal Claims, *see* 28 U.S.C. § 1491(a)(1), Congress expressly conferred

jurisdiction on the district court for all claims asserted in the Amended Complaint. CRA § 101(d)(1). In addition, because the Trust Administration Class had not previously been certified, Congress provided that "[n]otwithstanding the requirements of the Federal Rules of Civil Procedure, the court in the Litigation may certify the Trust Administration Class." *Id*. § 101(d)(2)(A).

VI. APPROVAL OF THE SETTLEMENT

Following enactment of the CRA, Plaintiffs undertook the most extensive class settlement notice process ever conducted. Plaintiffs sent direct mail notice to the known addresses of all class members; advertised the settlement extensively in local, regional, and national media, including television, radio, newspapers, and magazines; and contacted businesses, non-profits, educational institutions, and others serving Indians to provide posters, flyers, DVDs, and other materials containing notice of the settlement, in English and in multiple Indian languages. (App. 230-36.) In addition, Ms. Cobell and class counsel for months traveled thousands of miles through Indian Country to personally explain the settlement to thousands of class members. The settlement garnered significant media coverage and public statements by high-ranking government officials, including the President. (Dkt. # 3660 at 26.)

The settlement notice informed class members of their right to opt out of the Trust Administration Class and to submit objections to the settlement. Of the

500,000 class members in the two classes, the district court received only 92 objections and 1,824 opt outs, the overwhelming majority of which are from one tribe. (Dkt. # 3839-3 at 60, 6/20/2011 Tr. at 237; Dkt. # 3850 at 6.) All three objectors in this appeal filed timely objections and two, Good Bear and Colombe, opted out of the Trust Administration Class. (Dkt. # 3850-1 at 3.)

The district court held a fairness hearing on June 20, 2011. Good Bear and Johns appeared at the hearing and opposed the settlement. After hearing from the objectors and the parties' counsel, the district court approved the settlement, finding it "fair, reasonable, and adequate." (Dkt. # 3839-3 at 53-65; Dkt. # 3850 at 7.) The court entered its approval order on July 27, 2011, and entered final judgment on August 4, 2011. (Dkt. # 3853; Dkt. 3853-2 at 1-13.) Objectors appealed.

STATUTES AND REGULATIONS

All applicable statutes are contained in the addendum to the Brief for Objectors-Appellants.

SUMMARY OF THE ARGUMENT

1. Objectors' six-page argument section is entirely devoid of citation to governing legal authority and record evidence. Their arguments are so cursory that this Court should deem them waived and summarily affirm.

2. The settlement satisfies Article III's case-or-controversy requirement.

Objectors' case-or-controversy argument relies entirely on a law review article questioning the case-or-controversy status of settlement classes in non-adversarial proceedings. The legal theory advanced in that article has been rejected by the Supreme Court and numerous lower courts. In any event, the settlement of this contentious, 16-year litigation plainly satisfies the case-or-controversy requirement.

3. The district court did not abuse its discretion by denying Objectors' recusal request. Objectors do not cite the transcript documenting the court's purported statements, instead relying on a second-hand description of those statements made by a blogger on an obscure website. Moreover, the court's comments were made to justify waiting for Congress to act rather than proceeding further in litigation. Those statements do not satisfy the exceedingly high requirement of "extreme bias" necessary for recusal.

4. The district court did not abuse its discretion by finding the settlement fair, reasonable, and adequate. Objectors cite no record evidence to support their argument. In any event, in light of the adverse implications of *Cobell XXII*, the $1,000 payments to Historical Accounting Class members in lieu of an accounting is fair. In addition, the incentive awards to Elouise Cobell and the other named plaintiffs were appropriate given their essential involvement in this 16-year litigation and its settlement.

5. The settlement is consistent with *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). The Historical Accounting Class is certified under both Rule 23(b)(1)(A) and Rule 23(b)(2), and *Wal-Mart* addresses only the certification of (b)(2) classes. Moreover, the Historical Accounting Class claims seek only injunctive or declaratory relief and thus are properly *certified* under Rule 23(b)(2). Properly certified (b)(2) claims can be *settled* on any terms that the district court finds to be fair, reasonable, and adequate, including a settlement for monetary relief. In addition, the Trust Administration Class is certified under the CRA and therefore is exempt from Rule 23(a)'s commonality requirement. In any event, record evidence demonstrates that the Trust Administration Class satisfies the commonality requirement under *Wal-Mart*.

ARGUMENT

I. OBJECTORS' CURSORY ARGUMENTS ARE WAIVED.

Objectors' appellate brief raises four legal issues. (Obj. Br. 2.) The argument section of their brief, addressing those issues under four separate headings, consists of only six total pages of argument. That legal argument is entirely devoid of citation to governing authority and to record evidence. As a result, the legal reasoning is so cursory that it is often unclear what arguments Objectors are asserting. Accordingly, those arguments are waived.

This Court repeatedly has held that it will not "consider cursory arguments"

that fail to explain or support the issue raised. *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 49 n.37 (D.C. Cir. 2011). As the Court explained, "[i]t is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work." *Id.* Neither this Court nor the Appellees are required to decipher a legal argument the Objectors fail to adequately explain, or "to comb through the voluminous record in this case to determine the merits of an argument for which [Objectors] offer no support." *Catawba Cnty. v. EPA*, 571 F.3d 20, 42 (D.C. Cir. 2009).

As explained below, each of Objectors' arguments fails on the merits. But because Objectors failed to provide legal authority, record support, or even an arguable explanation for their contentions, the Court should find those arguments waived and summarily affirm.

II. THE SETTLEMENT SATISFIES ARTICLE III'S CASE OR CONTROVERSY REQUIREMENT.

Objectors first contend that "the settlement action is inherently unconstitutional because it is 'missing the adverseness between the parties that is a central element of Article III's case-or-controversy requirement.'" (Obj. Br. 15.) Alternatively, Objectors assert—in one sentence devoid of legal argument or explanation—that the CRA is unconstitutional because "it purports to confer jurisdiction on the district court" to approve a settlement that does not present a

case or controversy. (*Id*.) Both of these arguments fail for the reasons discussed below.

First, Objectors' arguments rely entirely on "the view propounded by" a law professor in a legal journal. (*Id.*) But that "view" is not the law. The Supreme Court has held that a settlement requiring judicial approval does not deprive a federal court of jurisdiction because, until the court approves the settlement, the case remains "definite and concrete, touching the legal relations of parties having adverse legal interests." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 371 & n.10 (1982). Likewise, numerous lower courts have concluded that class settlements do not raise case-or-controversy concerns. *See In re Prudential Ins. Co. America Sales Practice Litig. Agent Actions*, 148 F.3d 283, 306-07 (3d Cir. 1998); *In re Asbestos Litig*., 90 F.3d 963, 988-89 (5th Cir. 1996), *rev'd on other grounds*, *Ortiz v. Fibreboard Corp*., 521 U.S. 1114 (1997); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 176 F.R.D. 158, 172 (E.D. Pa. 1997); *Presidential Life Ins. Co. v. Milken*, 946 F. Supp. 267, 280 (S.D.N.Y. 1996).

Indeed, the sole case cited by Objectors in this section of their brief refutes their argument by concluding that settlement classes are permissible. *See In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 793-94 (3d Cir. 1995). Simply put, Objectors' legal argument that federal courts

lack jurisdiction to certify or approve settlement classes is erroneous and should be rejected.

In any event, even if some settlement classes do not satisfy the case-or-controversy requirement, this one does. This is not a case where the parties came before the court feigning adversity. The case has lasted 16 years, involved over 250 days of trials and hearings, and generated 80 published opinions and 12 previous appeals. To be sure, the Trust Administration Class claims were added to the case in an amended complaint as part of the settlement. (Dkt. # 3671.) But those claims are inextricably intertwined with the Historical Accounting Class claims and were excluded from the original lawsuit (which expressly requested relief that would make Plaintiffs whole) only because (until passage of the CRA) the Court of Federal Claims had exclusive jurisdiction over damages claims that exceeded $10,000 for each class member. *See* 28 U.S.C. § 1491(a)(1); CRA § 101(d)(1).

The continued adversity between Plaintiffs and the government is evident in their respective filings in support of the settlement. Plaintiffs contend that the government's obligation to manage IIM Trust assets is identical to that of a trustee at common law and therefore the government is responsible for a full historical accounting of all items of the Trust from its inception, restitution of benefits conferred, and money damages resulting from trust mismanagement. (Dkt. #

3762.) The government vigorously disputes this assertion. (Dkt. # 3764 at 12-13.) The settlement offers both sides an opportunity to resolve this decades-long dispute, but it does not eliminate the concrete, adverse legal interests that are the underpinnings of the settlement and the district court's final approval. And, plainly, it did not obviate the need for the district court to assess the evidentiary record, apply governing law, and determine the fairness of the settlement in light of the objections filed. Accordingly, Objectors' case-or-controversy arguments should be rejected.

III. THE DISTRICT JUDGE WAS NOT OBLIGATED TO RECUSE BASED ON STATEMENTS AT A STATUS CONFERENCE.

Objectors next assert that Judge Hogan should have recused himself from the fairness hearing under 28 U.S.C. § 455. (Obj. Br. 15-16.) Objectors rely on an obscure internet blog post that purports to quote a press release by Plaintiffs, which itself purports to quote the district court at an October 15, 2010 status conference concerning the parties' settlement. (*Id.*) Objectors have not cited the transcript of that October 15 court proceeding, nor did they attend that hearing. As the transcript demonstrates, Judge Hogan's actual comments were entirely appropriate.

As an initial matter, Objectors wrongly assert (again without legal citation) that "[w]hether this judge should have disqualified himself in the circumstances is a legal question which this Court must review *de novo*." (Obj. Br. 16.) That is not the correct standard of review. This Court "review[s] a district judge's refusal to

recuse under section 455(a) for abuse of discretion." *SEC v. Loving Spirit Found. Inc.*, 392 F.3d 486, 493 (D.C. Cir. 2004).

Here, the district judge did not abuse his discretion by declining to recuse. "It is well settled that a motion for recusal under 28 U.S.C. § 144 or § 455 (1982), must be based upon prejudice from an extra-judicial source." *Liberty Lobby, Inc. v. Dow Jones & Co., Inc.*, 838 F.2d 1287, 1301 (D.C. Cir. 1988). In reviewing a recusal claim under § 455(a), "this circuit applies an 'objective' standard: Recusal is required when a reasonable and informed observer would question the judge's impartiality." *District of Columbia v. Doe*, 611 F.3d 888, 899 (D.C. Cir. 2010). "[J]udicial rulings alone almost never constitute a valid basis for an allegation of bias or partiality." *Id*. (internal quotation marks omitted). Rather, § 455(a) requires recusal only in "the rarest circumstances" where the court's rulings evidence "extreme bias." *Loving Spirit Found.*, 392 F.3d at 493. The trial judge's statements or conduct must "reveal such a high degree of favoritism or antagonism as to make a fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994); *U-Haul Co. of Nevada, Inc. v. NLRB.*, 490 F.3d 957, 965 (D.C Cir. 2007).

Under this exacting standard, Objectors' evidence does not come close to showing that the district judge abused his discretion by declining to recuse. The court's comments came at a status conference to discuss this litigation. (10/15/2010 Tr. at 3-7.) At the time, the case effectively had been stayed for more

than a year while the parties waited for Congress to finish its debate and pass the CRA. Over the preceding year, the parties repeatedly had returned to the court to establish good cause to wait for Congressional approval rather than continuing to litigate. (*See, e.g.*, 8/18/2010 Tr. at 6.)

The comments that Objectors attribute to Judge Hogan were part of a finding by the court that the settlement had a strong chance of approval at the fairness hearing and thus it was appropriate to let the case remain stayed while the parties awaited action from Congress. (10/15/2010 Tr. at 3-7.) Importantly, Objectors' quotation to Judge Hogan's statement that the "merits are very clear" (Obj. Br. 16) omits the key portion of the sentence. At the hearing, the court acknowledged that Congress had combined its consideration of the *Cobell* legislation with other pieces of legislation and expressed hope that Congress "would seriously consider taking up the Cobell settlement on its own merits, independent of any other issues and consider it." (10/15/2010 Tr. at 5.) The court then explained that "the merits are very clear *as to the need for restitution of the funds lost through the mismanagement of the Indian Trust Royalty funds . . . .*" (*Id.*) (emphasis added). Contrary to Objectors' claims, those statements are not "out-of-court views" of the district court. (Obj. Br. 16.) Judge Hogan's observation is based solely on the record evidence of these proceedings. Moreover, his statement did not address the merits of the settlement, but instead the Plaintiffs' entitlement to relief for injuries

they had sustained. This Court has made similar comments, for example indicating that this case concerns "a serious injustice that has persisted for over a century and that cries out for redress." *Cobell XIX*, 455 F.3d at 335.

Moreover, at the fairness hearing, Judge Hogan expressly considered and rejected a request for his recusal based on those statements. He explained that, although he encouraged Congress to enact the settlement legislation, he did not pre-judge the fairness of the settlement and would consider the settlement's fairness "*de novo*" after hearing from all objectors. (Dkt. # 3839-3 at 36, 6/20/2011 Tr. at 138-39.) Because Objectors have failed to demonstrate "extreme bias" in Judge Hogan's in-court statements at the status conference, and thus have not satisfied the exceedingly high standard for recusal under § 455(a), the district judge did not abuse his discretion in rejecting Objectors' recusal request.

Objectors also assert in their summary of argument section (but not in the actual argument section) that "the court's scheduling order and conduct of the fairness hearing itself leave little doubt the court was determined to approve the settlement, leaving a reasonable observer to conclude the hearing was little more than a futile, if very expensive, formality." (Obj. Br. 12.) This argument is waived. An appellant does not preserve an argument for appeal if the argument is contained only in the summary of argument section but not explained and supported in the argument section itself. *See United States v. Thames*, 214 F.3d

608, 612 n.3 (5th Cir. 2000). In any event, this argument is meritless. The district court presided over a lengthy fairness hearing in which it provided all objectors an opportunity to speak on every issue they wished to raise. The court listened to the objectors' arguments at length and, after hearing from all objectors present, explained why it rejected each objection. (Dkt. # 3839-3 at 36, 6/20/2011 Tr. at 138-39.) Nothing in the court's even-handed management of the fairness hearing indicates any bias at all.

IV. THE DISTRICT COURT'S FAIRNESS FINDING IS CORRECT AND WELL WITHIN THE COURT'S DISCRETION.

Objectors next challenge the fairness of the settlement, but cite to no record evidence to support their claim. This Court reviews the district court's decision to approve a class settlement for abuse of discretion. *Thomas v. Albright*, 139 F.3d 227, 231-33 (D.C. Cir. 1998). It may not "substitute its views of fairness for those of the district court and the parties to the agreement, but is only to determine whether the district court's reasons for approving the [settlement] evidence appreciation of the relevant facts and reasoned analysis of those facts in light of the purposes of Rule 23." *Pigford v. Glickman*, 206 F.3d 1212, 1217 (D.C. Cir. 2000) (citation omitted). As explained below, Objectors failed to make the requisite "'clear showing' that an abuse of discretion has occurred." *Id.*

A. The settlement is fair, reasonable, and adequate.

When determining whether to approve a class settlement, courts in this Circuit "examine[] the following factors: (a) whether the settlement is the result of arm's length negotiations; (b) the terms of the settlement in relation to the strength of plaintiffs' case; (c) the status of the litigation at the time of settlement; (d) the reaction of the class; and, (e) the opinion of experienced counsel." *In re Vitamins Antitrust Litig.*, 305 F. Supp. 2d 100, 104 (D.D.C. 2004). The court's "primary task is to evaluate the terms of the settlement in relation to the strength of the plaintiffs' case." *Thomas*, 139 F.3d at 231. "The court should not reject a settlement merely because individual class members complain that they would have received more had they prevailed after a trial." *Id.*

Here, the court properly found the settlement to be "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The settlement is the product of arms-length negotiations. Moreover, it was not reached shortly after the case was filed; rather, Plaintiffs and class counsel vigorously litigated the case for more than 15 years and they are intimately familiar with the strengths and weaknesses of their evidence and legal positions. In particular, this Court's decision in *Cobell XXII*—departing, in Plaintiffs' view, from *Cobell VI*—rejected one of Plaintiffs' central claims in the litigation: that class members are entitled to a full historical accounting of all IIM Trust funds and other assets from the inception of the Trust. Thus, as the district

court noted, Plaintiffs were acutely aware of "the status of the last reversal from the [C]ircuit and the prospects . . . of years of litigation facing [the parties] on both sides, with rather dubious chances of ultimate success, frankly, if you read the law carefully as developed by our Circuit." (Dkt. # 3839-3 at 54-55, 6/20/2011 Tr. at 213-14.)

The settlement provides fair and adequate relief in light of those litigation realities. It obligates the government to spend $1.9 billion to purchase and consolidate fractionated, undivided IIM Trust interests. Trust reform has been a central goal in this litigation, and the government has long asserted that fractionation is a key obstacle to accurate accountings and prudent Trust management. *See supra*, at 9. In addition, each member of the Historical Accounting Class will receive $1,000, and each member of the Trust Administration Class will receive at least $800 plus additional amounts based on the ten highest revenue-generating years reflected in that individual's IIM account. In total, class members receive over $3.4 billion in tax-free economic benefits from the settlement—significantly greater than even the $455 million award reversed in *Cobell XXII*. That $3.4 billion settlement amount is the largest settlement involving the U.S. government in American history and it is in addition to the $5 billion that the government already has spent on trust reform as a result of this case. *See, e.g.*, U.S. Dep't of Interior, Office of the Special Tr. for Am. Indians,

Budget Justification for Fiscal Year 2010, at OST-20 (2010), *available at* http://www.doi.gov/ost/congressional/budget/FY2010_BudgetJustification.pdf (visited March 1, 2012).

This relief is particularly valuable to class members because lawsuits by IIM Trust beneficiaries are quite rare, and successful lawsuits are even rarer; such cases are expensive to litigate, require evidence that is very difficult to obtain, and are fraught with legal hurdles such as the statute of limitations. *See, e.g.*, *Brown v. United States*, 195 F.3d 1334 (Fed. Cir. 1999); *Begay v. Pub. Serv. Co. of N.M.*, 710 F. Supp. 2d 1161, 1202-03 (D.N.M. 2010); *Simmons v. United States*, 71 Fed. Cl. 188 (2006). This settlement is the only opportunity for most, if not all, class members to receive a substantial measure of justice for the government's wrongdoing. In light of *Cobell XXII*, congressional appropriation realities, and the difficulty of obtaining relief in IIM Trust litigation, the settlement provides class members with more than reasonably could be expected had this case proceeded to trial and further appeals.

The CRA provides further support for the district court's fairness determination. The Supreme Court has recognized that Congress can provide a legislative solution to complicated class actions where further litigation is unlikely to achieve a satisfactory outcome. *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 622-29 (1997). Here, this Court warned in *Cobell XXII* that "our precedents do not

clearly point to any exit from this complicated legal morass." 573 F.3d at 812. The parties heeded this Court's warning and agreed to a fair settlement; Congress heeded this Court's warning and enacted the CRA to resolve this difficult dispute. Moreover, Congress did not merely appropriate the requisite funds, grant the district court jurisdiction over the Trust Administration Class claims, and address the tax and benefits-eligibility status of settlement payments—it went further and specifically "authorized, ratified, and confirmed" the settlement. CRA § 101(c)(1).

This Congressional mandate is particularly potent because "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that [the Supreme Court] ha[s] consistently described as 'plenary and exclusive.'" *United States v. Lara*, 541 U.S. 193, 200 (2004). Congress' plenary power is at its zenith where, as here, the legislation involves Indian lands and other assets. Congress' authority over Indian lands and other assets "has been termed 'one of the most fundamental expressions, if not the major expression, of the constitutional power of Congress over Indian affairs.'" *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 86 (1977).

When Congress exercises its plenary authority, its enactments are measured by rational-basis review: "the legislative judgment should not be disturbed '[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians.'" *Id*. at 85. The CRA satisfies this standard

because it "rationally support[s] [Congress'] decision to avoid undue delay, administrative difficulty, and potentially unmeritorious claims." *Id*. at 89-90. As Justice Blackmun explained, "there necessarily is a large measure of arbitrariness in distributing an award for a century-old wrong," but "Congress must have a large measure of flexibility in allocating Indian awards." *Id*. at 91 (concurring opinion).

Given Congress' approval pursuant to its plenary power, the adverse implications of *Cobell XXII* on Plaintiffs' claims, the uncertainty of congressional appropriations, the extraordinary length and complexity of the litigation, the many years of further expensive litigation if the settlement is not approved, the few objections, and the substantial relief afforded by the settlement, the district court did not abuse its discretion by finding the settlement to be fair, reasonable, and adequate.

B. Objectors' arguments concerning the $1,000 payments to Historical Accounting Class members are meritless.

Objectors focus their fairness argument on the $1,000 payments to Historical Accounting Class members, asserting that class members whose IIM accounts have only pennies receive the same $1,000 payment as class members who have very large IIM account balances. (Obj. Br. 17-18.) But this argument is premised on a misunderstanding of the nature and purpose of the Historical Accounting Class settlement payments.

The $1,000 payments to Historical Accounting Class members are not compensation or restitution for accounting errors or the government's mismanagement of IIM Trust assets; they are payments in lieu of an historical accounting through the record date of the Settlement. In effect, the government is buying class members' rights to an historical accounting for consideration in the amount of $1,000. Given the litigation realities of this case, the district court did not abuse its discretion in finding this settlement payment to be fair and reasonable.

As explained above, *Cobell XXII* conditioned and dramatically limited the accounting that class members would receive in this action. This Court held that the government must undertake only "the best accounting possible, in a reasonable time, with the money that Congress is willing to appropriate." 573 F.3d at 813. The Court also instructed that, during such an accounting, Interior need only "concentrate on picking the low-hanging fruit." *Id*. at 815. Thus, it is unlikely that class members will receive a meaningful historical accounting because, as this Court recognized, that accounting could require Congress to "spend billions to recover millions," *id*. at 810, and Congress would not view that accounting as an efficient use of government funds.

Moreover, although Plaintiffs have long alleged that there are numerous accounting errors within the IIM Trust, the district court has not agreed. For

example, the government introduced into evidence a 2,000-page report from an Interior contractor who reviewed IIM account data. (Defs. Ex. 142.) That report and related record evidence, which Objectors have not challenged in their objections or their opening brief, asserts that the government had successfully tracked 48,985,831 of the 49,064,275 IIM transactions (over 99.84%) during a 22-year period. (*Id*. at 26, 29.) Based on this and other record evidence, the district court observed after the 2008 trial that "one permissible conclusion from the record would be that the government has not withheld any funds from plaintiffs' accounts. . . . [D]espite a profusion of evidence and opinion about the unreliability of IIM records, there has been essentially no direct evidence" of errors in IIM accounts. *Cobell XXI*, 569 F. Supp. 2d at 238.

In short, given this Court's holdings and the reluctance of Congress to appropriate any more funds for an accounting, class members are unlikely to receive any accounting of "low-hanging fruit," whatever that means. Moreover, the government's evidence and the district court's findings suggest that there are few, if any, transactional accounting errors. In light of these realities, the district court did not abuse its discretion in approving a settlement that provided all class members with a $1,000 payment in exchange for giving up their right to the historical accounting described by *Cobell XXII*.

Objectors also assert that the $1,000 payments to Historical Accounting Class members are inconsistent with language in *Cobell XXII* stating that monetary payments for the accounting claim "would be inaccurate and unfair." (Obj. Br. 18.) But that language in *Cobell XXII* addressed the district court's decision to award $455 million in *restitution* to class members. 573 F.3d at 813. In other words, the district court's award was an attempt to estimate the value of unknown errors in each class members' account and compensate class members for the value of those errors. *Id*. By contrast, the $1,000 payments in the settlement are *not* restitution; these payments are consideration in exchange for giving up an accounting right that, in light of litigation realities, would provide no relief to class members. Those payments are consistent with the holding in *Cobell XXII*; indeed, those payments stem largely from the court's holding in *Cobell XXII* that both conditioned and narrowly limited the scope of the government's accounting obligations. *Id*. at 813-14.

Objectors next point to the government's motion to dismiss in *Two Shields v. United States*, No. 11-531-L (Fed. Cl.) as proof that "the writing is on the wall." (Obj. Br. 18.) As an initial matter, the *Two Shields* lawsuit is not part of the record on appeal in this case and Objectors have not moved the Court to add those pleadings or take judicial notice of them. Notably, neither of the *Two Shields* plaintiffs objected to this settlement. Nor did they opt out of the Trust

Administration Class. Accordingly, Objectors have no arguable standing to represent the interests of, or assert any harm to, those plaintiffs in this Court.[4] *See Glasser v. Volkswagen of America, Inc.*, 645 F.3d 1084, 1088-89 (9th Cir. 2011).

In any event, Objectors fail to explain their cursory argument so it is difficult to understand what "writing is on the wall." The government's motion to dismiss in *Two Shields* is based on a jurisdictional statute, 28 U.S.C. § 1500, which divests the Court of Federal Claims of jurisdiction in any action involving the same operative facts as a case pending in any federal district court. *See United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723, 1731 (2011). The government contends that the claims in the *Two Shields* complaint involve the same operative facts as the Trust Administration Class claims in *Cobell*. *See Two Shields v. United States*, No. 11-531-L, Dkt. 7-1 (Fed. Cl.). Thus, the government argues that the Court of Federal Claims lacks jurisdiction over *Two Shields* while *Cobell* is pending. *Id*. Nothing in the government's *Two Shields* motion has any bearing on whether the $1,000 payments to Historical Accounting Class members are fair.

[4] One of the Objectors, Carol Good Bear, claims to be a member of the putative *Two Shields* class. (Obj. Br. 18.) But the opt-in class proposed in *Two Shields* has not been certified by the Court of Federal Claims. In any event, Good Bear opted out of the Trust Administration Class settlement in this case. (Dkt. # 3850-1 at 3.) Thus, the *Cobell* settlement does not preclude Good Bear from pursuing her mismanagement claim in the *Two Shields* litigation or in her own, individual complaint in the Court of Federal Claims. Indeed, the settlement agreement expressly permits class members who opt out to seek "an accounting in aid of jurisdiction" as part of their individual mismanagement claims. (Dkt. # 3660-2 at 48.)

Finally, Objectors' arguments concerning the $1,000 payments improperly focus on only one aspect of the Historical Accounting Class settlement. It is well-settled that class objectors cannot satisfy their burden to show abuse of discretion by targeting "particular portions of the overall settlement" and claiming that some class members "are individually entitled to more." *Thomas*, 139 F.3d at 233. Instead, this "court must evaluate the district court's decision to approve the [settlement], with whatever shortcomings [specific provisions] might present, in light of the agreement as a whole." *Pigford*, 206 F.3d at 1219. Here, the settlement also includes significant additional relief to Historical Accounting Class members beyond the $1,000 payments.

A key goal of this case from the outset has been "'fixing the system' or reforming the management and accounting of the IIM trusts so as to meet the federal government's fiduciary responsibilities." *Cobell VI*, 240 F.3d at 1093. To that end, the largest portion of the settlement, valued at $1.9 billion, is the Trust Land Consolidation Fund. (Dkt. # 3660-2 at 37-40.) Interior must use that fund to purchase highly fractionated, undivided interests in land within the IIM Trust and consolidate them into tribal beneficial ownership. (*Id.*) The government has consistently maintained that continuously fractionating interests contribute materially to its inability to maintain accurate IIM Trust records and prudently manage the commingled Trust. *See supra*, at 9. Even the Supreme Court has

recognized that "extreme fractionation of Indian lands is a serious public problem." *Hodel v. Irving*, 481 U.S. 704, 718 (1987). The $1.9 billion fund to purchase fractionated interests and consolidate them is the centerpiece of the settlement and will dramatically improve the government's ability to manage the IIM Trust prudently. This significant relief for class members further underscores that the district court's fairness finding is not an abuse of discretion.

C. Objectors' arguments concerning the named plaintiffs' incentive awards are meritless.

Objectors next argue that the settlement is unfair because "the representative plaintiffs should receive 150 to 2,000 times as much as [objectors] will receive from this settlement." (Obj. Br. 17.) Objectors provide no explanation for their "150 to 2,000 times" figure, but it appears they are referencing the incentive awards the district court provided to the named plaintiffs. At the fairness hearing, the court awarded Elouise Cobell a $2 million incentive award and smaller awards to the other three named plaintiffs. (Dkt. # 3839-3 at 62-63, 6/20/2011 Tr. at 241-42.) As explained below, these incentive awards are proper and do not affect the fairness of the settlement.

Appellate courts review incentive awards for abuse of discretion. *Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399, 408 (7th Cir. 2000). "[C]ourts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action

litigation." *In re Lorazepam & Clorazepate Antitrust Litig*., 205 F.R.D. 369, 400 (D.D.C. 2002). "In deciding whether to grant incentive awards and the amounts of such awards, courts consider factors such as the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation." *Wells v. Allstate Ins. Co.*, 557 F. Supp. 2d 1, 8-9 (D.D.C. 2008) (internal quotation marks omitted).

Admittedly, $2 million is a large incentive award, but Elouise Cobell deserved every penny of it. Ms. Cobell did not sit on the sidelines while class counsel handled the case and negotiated a settlement. She dedicated her life to obtaining justice for her fellow Indians—she was involved in every strategic decision and made every political decision in the case; she spent nearly $390,000 of her own money on the lawsuit; and for years she traveled the country speaking with IIM beneficiaries and raising funds to cover litigation costs. (Dkt. # 3679 at 11; Dkt. # 3679-3 at 4, 6-7.) Her work on the case won her a prestigious "Genius Grant" from the MacArthur Foundation; honorary degrees from Dartmouth College, Montana State University, and Rollins College; and awards from groups as diverse as the International Women's Forum and AARP. (Dkt. # 3679-3 at 4, 7.) Sadly, Ms. Cobell died after final approval of the settlement. As a testament to her remarkable achievements through this historic lawsuit, numerous members of

Congress extended their condolences, President Obama issued a formal statement celebrating her life and accomplishments, and the *New York Times* and *Washington Post* published obituaries commemorating her unflinching commitment to reforming the IIM Trust. *See, e.g.*, *Elouise Cobell, A Native American Leader Who Took on Washington and Won*, Wash. Post, Oct. 17, 2011, at B6.

The district court carefully considered these factors in awarding Ms. Cobell her $2 million incentive payment:

> [Ms. Cobell] has accomplished more for the individual, I think, Native Americans than any other person recently that I can think of in history. This is her case. She contributed hundreds of thousands of dollars. She helped fund raise. She spent hundreds and thousands of hours. She was part of every serious, strategic decision made. She dedicated up to 1,200 hours per year. She put her reputation on the line, her health, and has unprecedented efforts by a named plaintiff I have not seen before in a class action case. I believe she is fully entitled to the award that she has requested in this matter.

(Dkt. # 3839-3 at 61, 6/20/2011 Tr. at 239-40.) The district court made similar findings with respect to the much smaller incentive awards to the other three named plaintiffs. (*Id.*) Objectors do not cite *any* evidence contradicting these findings.

In sum, Objectors cite to no record evidence to support their claim that the incentive awards are unfair, nor do they provide any legal reason why the district court abused its discretion in awarding those incentives to Ms. Cobell and her

fellow named plaintiffs for their tireless efforts on behalf of class members. Objectors' arguments should be rejected.

V. THE SETTLEMENT IS CONSISTENT WITH THE SUPREME COURT'S DECISION IN *WAL-MART*.

Finally, Objectors argue that the settlement "is inconsistent with the recent teachings of the Supreme Court in *Wal-Mart v. Dukes*, 131 S. Ct. 2541 (2011)." (Obj. Br. 19.) Objectors' two *Wal-Mart* arguments are meritless.

A. Approval of the Historical Accounting Class settlement is consistent with *Wal-Mart*.

First, Objectors assert that "[i]f the *Wal-Mart* plaintiffs fatally sought non-incidental monetary recovery as well as injunctive or declaratory relief, the *Cobell* plaintiffs have eschewed injunctive or declaratory relief altogether in favor of a monetary recovery." (Obj. Br. 19-20.) This argument appears to refer to *Wal-Mart*'s concern about the certification of classes seeking monetary relief under Rule 23(b)(2). *See* 131 S. Ct. at 2557. In *Wal-Mart*, the plaintiffs sought backpay, arguably a form of equitable relief, in an effort to fit within Rule 23(b)(2). *Id*. *Wal-Mart* held that Rule 23(b)(2) permits certification only of claims for "final injunctive relief or corresponding declaratory relief" and not for other forms of equitable relief that are monetary in nature, like backpay. *Id*.

The Historical Accounting Class is perfectly consistent with *Wal-Mart*.[5] First, the Historical Accounting Class is certified alternatively under both Rule 23(b)(1)(A) and 23(b)(2). Thus, if certification is proper under Rule 23(b)(1)(A), this Court may affirm without the need to determine whether the claims are properly certified under Rule 23(b)(2). *See DeBoer v. Mellon Mortg. Co*., 64 F.3d 1171, 1175 (8th Cir. 1995). Unlike Rule 23(b)(2) classes, Rule 23(b)(1)(A) classes may seek predominantly monetary relief. *See Chesemore v. Alliance Holdings, Inc*., 276 F.R.D. 506, 517-18 (W.D. Wis. 2011); *see also Neil v. Zell*, 275 F.R.D. 256, 267 (N.D. Ill. 2011). Indeed, even *Wal-Mart* distinguished (b)(1) from (b)(2) classes, noting that there are many (b)(1) classes, such as "limited fund" cases, in which the relief sought is *entirely* monetary. 131 S. Ct. at 2558 n.11. Objector's brief presents no argument why the Historical Accounting Class was not properly certified under Rule 23(b)(1)(A), so any such contention has been waived. *See City of Waukesha v. EPA*, 320 F.3d 228, 251 n.22 (D.C. Cir. 2003).

Second, with respect to Rule 23(b)(2), *Wal-Mart* addresses class *certification*, not class *settlement*. Here, it is undisputed that the Historical Accounting Class is properly certified as a Rule 23(b)(2) class seeking only injunctive or declaratory relief. (Dkt. # 3671 at 25.) Indeed, the Historical

[5] As explained *infra* at 40, the Trust Administration Class is certified under the CRA and alternatively under Rule 23(b)(3). Thus, the portion of *Wal-Mart* dealing with certification under Rule 23(b)(2) does not apply to the Trust Administration Class.

Accounting Class is the same class originally certified for injunctive and declaratory relief more than 15 years ago on February 4, 1997, with only minor changes to conform to this Court's decisions in this case. (Dkt. # 27; Dkt. # 3671 at 19.) As certified, the class seeks *only* injunctive relief—specifically, an order that "Defendants provide a complete and accurate accounting of all IIM Trust assets from the inception of the trust to the present." (Dkt. # 3671 at 24.) Thus, unlike the backpay claims asserted in *Wal-Mart*, the Historical Accounting Class claims fall squarely within the permissible scope of Rule 23(b)(2).

Moreover, *Wal-Mart* does not preclude a properly certified Rule 23(b)(2) class from *settling* for monetary relief. Indeed, in light of the litigation realities described *supra* at 6-8, it would be unprecedented and perverse to insist that the Historical Accounting Class claims cannot be settled for money and instead must limp toward an unsatisfactory and unknown result on the claim for injunctive relief. Precluding a monetary settlement in these circumstances would mean that "Plaintiffs could initiate the action but could not settle it. This would turn this case into an unstoppable zombie, yielding only to the lethal force of dispositive Court action." *In re Merck & Co. Sec., Derivative & ERISA Litig.*, MDL No. 1658 (SRC), 2009 WL 331426, at *8 (D.N.J. Feb. 10, 2009). In short, the Historical Accounting Class is properly certified under Rule 23(b)(2) and thus can be settled

on any terms that the district court finds to be fair, reasonable, and adequate. *See* Fed. R. Civ. P. 23(e)(4).

B. Approval of the Trust Administration Class is consistent with *Wal-Mart*.

Objectors next argue that "[t]he Trust Administration Class cannot reasonably be said to meet the requirements of Rule 23(a) requirements [sic] of commonality." (Obj. Br. 20.) In *Wal-Mart*, the Supreme Court held that commonality is not satisfied merely by identifying a "common question." 131 S. Ct. at 2551. Rather, the class must share a common *disputed* question. *Id.* "That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* Objectors appear to assert (obliquely) that the Trust Administration Class cannot satisfy this portion of the *Wal-Mart* holding. That argument fails for two reasons.

First, the Trust Administration Class need not satisfy Rule 23(a)(2) commonality, or any other requirements of Rule 23(a). The CRA authorized the district court to certify the Trust Administration Class "[n]otwithstanding the requirements of the Federal Rules of Civil Procedure." CRA § 101(d)(2)(A). The district court, pursuant to this legislative directive, certified the Trust Administration Class under the CRA. (Dkt. # 3670.) As a result, the Trust

Administration Class need only satisfy the "minimal procedural due process protection" necessary to certify a class action in the absence of Rule 23's requirements: notice, the right to be heard, the right to opt-out, and adequacy of representation. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985).

Objectors do not contend that the Trust Administration Class fails to satisfy these "minimal procedural due process requirements," not can they. Plaintiffs undertook the most comprehensive class notice in history (Dkt. # 3762 at 16-22); the Trust Administration Class settlement provides an unfettered right to object to the settlement and to opt out (Dkt. # 3660-19 at 13-14); and the district court made detailed findings about the adequacy of Ms. Cobell and the other named plaintiffs to represent the class (Dkt. # 3839-3 at 61-62, 6/20/2011 Tr. at 239-42). Thus, the minimal due process requirements of *Shutts* are readily satisfied.

Second, even if Rule 23(a)(2)'s commonality requirement applied to the Trust Administration Class—and it does not—that requirement is satisfied here. The central claim of the Trust Administration Class is the government's systemic mismanagement of IIM Trust assets. All class members share a common disputed legal (and factual) issue with respect to that claim: the nature and scope of the government's trust duties to IIM beneficiaries of the commingled trust.

Plaintiffs contend that the government's obligation to manage the commingled IIM Trust assets is identical to that of a trustee at common law. The

government disputes this assertion. (Dkt. # 3764 at 12-13.) Indeed, the government argued in *Cobell VI* that "the district court improperly construed the nature and extent of the government's fiduciary duties to IIM trust beneficiaries," and that its trust obligations are substantially narrower than those of a common-law trustee. 240 F.3d at 1094. Simply put, the parties disagree about the fiduciary standards that govern the management of IIM Trust assets. The answer to that disputed question is not just common, but central, to all class members' claims concerning their commingled trust assets.

This common answer distinguishes this case from *Wal-Mart*. There was no dispute in *Wal-Mart* about whether Title VII applied to class members. Thus, it was not enough for class members to allege "that they have all suffered a violation of the same provision of law." *Wal-Mart*, 131 S. Ct. at 2551. Here, by contrast, the central issue in this lawsuit—about which Plaintiffs and the government vigorously disagree—is the nature and scope of the government's trust duties to class members in the management of this unique commingled trust. This common legal issue unites all class members in a way the garden-variety *Wal-Mart* discrimination claims did not.

Moreover, this class action differs from *Wal-Mart* in another important respect. In *Wal-Mart*, the company gave individual store managers discretion regarding hiring and promotion. The plaintiffs alleged that these store managers

engaged in discrimination, but could not "identif[y] a common mode of exercising discretion that pervades the entire company." *Id*. at 2554-55. Here, by contrast, there is irrefutable record evidence that the government's mismanagement has been systemic and pervasive, including trial testimony by a previous Secretary of the Interior admitting to personal breaches of fiduciary duties. (9/7/1999 Tr. at 3768-69.) *See also 1915 Report*, *supra* at 2; *Misplaced Trust*, *supra*; *Cobell VI*, 240 F.3d at 1089. Accordingly, the Trust Administration Class satisfies Rule 23(a)(2)'s commonality requirement. *See McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, --- F.3d. ---, No. 11-3639 (7th Cir. Feb. 24, 2012).

CONCLUSION

The Court should reject the Objectors' arguments and affirm the district court's class certification decision and final approval of this historic class action settlement.

Respectfully submitted,

/s/ Adam H. Charnes
Adam H. Charnes
David C. Smith
Richard D. Dietz
KILPATRICK TOWNSEND & STOCKTON LLP
1001 W. Fourth Street
Winston-Salem, North Carolina 27101
Telephone: (336) 607-7300

Dennis M. Gingold
THE LAW OFFICE OF DENNIS M. GINGOLD
607 14th Street, N.W., 9th Floor
Washington, D.C. 20005
Telephone: (202) 824-1448

Keith M. Harper
Michael Alexander Pearl
KILPATRICK TOWNSEND & STOCKTON LLP
607 14th Street, N.W.
Washington, D.C. 20005
Telephone: (202) 508-5844

William E. Dorris
Elliott Levitas
KILPATRICK TOWNSEND & STOCKTON LLP
1100 Peachtree Street, Suite 2800
Atlanta, Georgia 30309
Telephone: (404) 815-6500

DATED: March 2, 2012

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(iii) because it contains 9,931 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using MS Word 2003 in Times New Roman 14-point font.

DATED: March 2, 2012

/s/ Adam H. Charnes
Adam H. Charnes
KILPATRICK TOWNSEND & STOCKTON LLP
1001 W. Fourth Street
Winston-Salem, North Carolina 27101
Telephone: (336) 607-7300

CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2012, I filed a copy of the foregoing SUPPLEMENTAL BRIEF OF PLAINTIFFS-APPELLEES with the clerk of court using the CM/ECF system and served a copy by first class mail on the following:

David C. Harrison
Law Offices of David C. Harrison
Two Park Square
6565 Americas Pkwy., Suite 200
Albuquerque, NM 87110

Thomas M. Bondy
Brian P. Goldman
UNITED STATES DEPARTMENT OF JUSTICE
Appellate Staff, Civil Division
950 Pennsylvania Avenue, N.W.
Room 7535
Washington, D.C. 20530

Robert E. Kirschman, Jr.
John J. Siemietkowski
UNITED STATES DEPARTMENT OF JUSTICE
Commercial Litigation Branch, Civil Division
P.O. Box 875, Ben Franklin Station
Washington, D.C. 20044

/s/ Adam H. Charnes
Adam H. Charnes
KILPATRICK TOWNSEND &
STOCKTON LLP
1001 W. Fourth Street
Winston-Salem, North Carolina 27101
Telephone: (336) 607-7300