

[ORAL ARGUMENT SCHEDULED FOR FEBRUARY 16, 2012]

No. 11-5205

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

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

KIMBERLY CRAVEN,  
Objector-Appellant,

v.

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

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**PLAINTIFFS' OPPOSITION TO OBJECTOR-APPELLANT'S  
SECOND MOTION FOR JUDICIAL NOTICE**

Plaintiffs oppose Objector-Appellant Kimberly Craven's second motion for judicial notice. Craven asks the Court to take judicial notice of a brief filed by the United States in *Two Shields v. United States*, No. 11-531-L (Fed. Cl.), opposing class certification. (Mot. 2.) Craven contends that "as a matter of inexorable logic" this brief proves that the *Cobell* settlement is improper. (*Id.*) As with Craven's first motion for judicial notice, this second motion should be denied.

*First*, Craven again seeks judicial notice for an impermissible purpose. A court may take judicial notice of pleadings in a separate, pending lawsuit only to

show that those pleadings exist, but not for the truth of the factual allegations or for the correctness of legal arguments contained within them. *See Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388-89 (2d Cir. 1992); *Am. Mgmt. Sys., Inc. v. United States*, No. 01-7197, 2002 WL 31778773, at \*1 (D.C. Cir. Dec. 4, 2002). Here, Craven’s argument is not merely that the government opposed certification of a putative class in the *Two Shields* litigation—which by itself is judicially noticeable, but meaningless to this case—but also that *Two Shields* concerns the same facts as this case and that the government’s legal arguments there are correct. (Mot. 2.) But it is not proper for this Court to judicially notice the factual allegations in *Two Shields*, nor can the Court take as correct the legal arguments advanced by the government there.

*Second*, contrary to Craven’s argument (Mot. 2), the government’s *Two Shields* pleading is not a “concession” that *Cobell*’s Trust Administration Class cannot be certified. Class certification in the *Two Shields* case is governed by Rule 23 of the Rules of the Court of Federal Claims, which is similar—but not identical—to Federal Rule of Civil Procedure 23. But Federal Rule 23 does not apply here. Craven ignores the Claims Resolution Act of 2010 (“CRA”), Pub. L. No. 111-291, 124 Stat. 3064, which expressly permits certification of the Trust Administration Class “[n]otwithstanding the requirements of the Federal Rules of Civil Procedure.” CRA § 101(d)(2)(A). Thus, although Rule 23(a)(2)’s

commonality requirement is satisfied in *Cobell*, that requirement is irrelevant because the Trust Administration Class need not satisfy Rule 23(a)(2)—it need only satisfy the “minimal procedural due process” requirements for class certification established by the Supreme Court in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). The *Shutts* factors do not include a commonality requirement. *Id.*

*Third*, Craven mischaracterizes the government’s Rule 23 argument in its *Two Shields* brief. That argument is based on Rule 23(b)(3)’s predominance requirement, not Rule 23(a)(2)’s commonality requirement. (Mot. Ex. 1 at 11-12.) To satisfy Rule 23(a)(2)’s commonality requirement, a class needs only one “common contention.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). By contrast, Rule 23(b)(3), under which the *Two Shields* plaintiffs seek class certification, permits certification only if “the court finds that the questions of law or fact common to class members *predominate* over any questions affecting only individual members.” R. Ct. Fed. Cl. 23(b)(3) (emphasis added).<sup>1</sup> The government’s brief in *Two Shields* does not argue that the class lacks *any* common issues under Rule 23(a)(2), but instead that “[i]n this case, individual fact issues *predominate* over common fact issues.” (Mot. Ex. 1 at 12) (emphasis added).

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<sup>1</sup> The relevant language in Rule 23(b)(3) of the Rules of the Court of Federal Claims is identical to the language in Rule 23(b)(3) of the Federal Rules of Civil Procedure.

That is a predominance argument based on Rule 23(b)(3). In this appeal, Craven never argued that the Trust Administration Class does not satisfy Rule 23(b)(3)'s predominance requirement, and that argument is therefore waived. *See United States v. Reeves*, 586 F.3d 20, 26 (D.C. Cir. 2009).

*Fourth*, even if the government's brief were the proper subject of judicial notice (it is not), and even if Craven's characterization of that brief were correct (it is not), the Court should still deny this motion because the government's *Two Shields* brief is irrelevant. This Court will decide whether the district court properly certified the Trust Administration Class based on its own understanding of the applicable legal principles, irrespective of the government's positions in other cases. This is particularly true here because, even if Craven were correct that the government is taking inconsistent positions, Plaintiffs are not bound by—and cannot be prejudiced by—what the government says in an unrelated case before a different court.

### **CONCLUSION**

For the reasons discussed above, the Court should deny Objector-Appellant Kimberly Craven's Second Motion for Judicial Notice.

Respectfully submitted,

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DATED: December 27, 2011

**CERTIFICATE OF SERVICE**

I hereby certify that on December 27, 2011, I filed a copy of the foregoing  
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