[ORAL ARGUMENT SCHEDULED FOR FEBRUARY 16, 2012]

No. 11-5205

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

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

KIMBERLY CRAVEN,
Objector-Appellant,

v.

KENNETH LEE SALAZAR, *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

SUPPLEMENTAL BRIEF OF PLAINTIFFS-APPELLEES

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

GLOSSARY

Craven App.	Objector-Appellant Kimberly Craven's separate appendix
Craven Br.	Objector-Appellant Kimberly Craven's opening brief
IIM	Individual Indian Money

Pursuant to the Court's February 2, 2012 order, Plaintiffs respectfully submit this supplemental brief addressing whether Objector-Appellant Kimberly Craven has standing to challenge the fairness of the settlement.

ARGUMENT

I. CRAVEN DOES NOT SATISFY THE INJURY-IN-FACT REQUIREMENT OF ARTICLE III STANDING.

Craven lacks Article III standing to challenge the fairness of the settlement because she does not satisfy the injury-in-fact requirement. The Court should dismiss her fairness challenge for lack of jurisdiction.

Article III standing is grounded in the "fundamental limitation" of the case or controversy clause in Article III of the Constitution. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). That provision "requires federal courts to satisfy themselves that the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction." *Id*. (internal quotation marks omitted). The party seeking relief from the court "bears the burden of showing that he has standing for each type of relief sought." *Id*.

"To establish standing, a plaintiff must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged action; and redressable by a favorable ruling." *Horne v. Flores*, 129 S. Ct. 2579, 2592 (2009). The purpose of this three-part test is to ensure "that there is

a real need to exercise the power of judicial review in order to protect the interests of the complaining party." *Summers*, 555 U.S. at 493.

As explained below, Craven's objections concerning the fairness of the settlement do not satisfy the injury-in-fact requirement of the Article III standing test.

A. Craven has not alleged or shown any injury to herself.

To satisfy the injury-in-fact requirement of standing, a litigant "must present an injury that is concrete, particularized, and actual or imminent." *Horne*, 129 S. Ct. at 2592. This Circuit holds that a "particularized" injury is one that "affect[s] the plaintiff in a personal and individual way." *New York Regional Interconnect, Inc. v. FERC*, 634 F.3d 581, 586 (D.C. Cir. 2011). Craven fails to show (or even allege) that the settlement's alleged unfairness harms her in any "personal and individual way."

First, in her opening brief Craven argues that some class members' IIM funds "were misallocated to the wrong account" and that this misallocation is unfair and creates an intraclass conflict. (Craven Br. at 24-25.) Craven attempts to support this argument with a hypothetical involving "Indian A" and "Indian B," and with Elouise Cobell's Senate testimony about James Kennerly, whose account (according to Craven) is missing millions of dollars in oil royalties. (*Id*. at 25.) But Craven never once alleges or presents evidence—in her objections, in her

argument at the fairness hearing, or in her opening brief—that funds *from her own IIM account* are misallocated or missing. Indeed, she does not discuss her own IIM account at all, much less contend that she is one of the class members who will suffer an injury from the allegedly unfair distribution of the settlement proceeds.

Second, in her reply brief, Craven argues that the settlement "reaches its unfair result by wildly overcompensating class members with no claims . . . while extinguishing the rights of class members with sizable potential claims such as the *Two Shields* class." (Craven Reply Br. 10.) Craven supports this argument (which was not raised in her objections, in her argument at the fairness hearing, or in her opening appellate brief) with the unproven allegations in the *Two Shields* complaint. (*Id*.; *see also* Plaintiffs' Br. 31-32.) But again, Craven never alleges or submits evidence that she has a "sizable" mismanagement claim similar to the allegations in the *Two Shields* complaint. Indeed, Craven does not assert that the government mismanaged her personal IIM assets at all.

Thus, Craven does not assert that either of the two grounds on which she contends the settlement is unfair actually harms her in a personal and individual way. Instead, she argues only that the settlement is unfair *to other class members*, but not to herself. Notably, however, neither James Kennerly nor the *Two Shields* plaintiffs objected to the settlement or opted out of it.

B. Craven cannot rely solely on her status as a class objector to confer Article III standing.

Because Craven does not (and cannot) contend that the settlement's alleged unfairness harms her personally, she presumably will contend that injury exists because she is bound by the allegedly unfair settlement and final judgment. But "[i]n the class action context, simply being a member of the class does not automatically confer standing to challenge" alleged unfairness in a class settlement. *Glasser v. Volkswagen of America, Inc*., 645 F.3d 1084, 1088 (9th Cir. 2011). To be sure, avoiding an unfair class settlement is "a cognizable interest for purpose of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-63 (1992). "But the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Id*. at 563.

Indeed, there are countless cases holding that merely being subject to an unconstitutional or illegal statute is insufficient to confer standing. Rather, "[t]he party who invokes the power [of the court] must be able to show, not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some *direct injury* as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." *Doremus v. Board of Ed. of Borough of Hawthorne*, 342 U.S. 429, 434 (1952) (emphasis added).

Thus, it is not enough for Craven to claim that she is injured merely because she is bound by the allegedly unfair settlement along with 500,000 other class members; that purported injury is no different from the injury suffered by a plaintiff who is subject to a law that is unconstitutional as to others but lawful as to her. To establish an injury-in-fact, Craven must show not only that the settlement is unfair to some class members, but also that she is among those class members who are directly harmed by that unfair treatment. *Lujan*, 504 U.S. at 563. In *Glasser*, for example, the Ninth Circuit recently held that a class objector lacked standing to challenge the fee award to class counsel because the award was not paid out of the settlement funds and therefore the objector was not "'aggrieved' by the fee award." 645 F.3d at 1087-88; *but see Union Asset Mgmt. Holding A.G. v. Dell, Inc*., --- F.3d ---, 2012 WL 375249 (5th Cir. Feb. 7, 2012). Like the objector in *Glasser*, Craven lacks standing because she failed to allege or show that she is personally harmed by the purported inequity in the settlement of which she complains.

The Supreme Court's discussion of standing in *Devlin v. Scardelletti*, 536 U.S. 1 (2002), does not alter this conclusion. In *Devlin*, the Supreme Court held that "[a]s a member of the retiree class, [the objector] has an interest in the settlement that creates a 'case or controversy' sufficient to satisfy the constitutional requirements of injury, causation, and redressability." *Id.* at 6-7. But this language

from *Devlin* does not mean that *all* class objectors automatically have standing to pursue *any* objections. The class settlement in *Devlin* involved two groups of class members—active employees and retirees—and the objector, a retiree, argued that the settlement was unfair to all retirees because it eliminated certain pension benefits. *Id*. at 5. In other words, the objector in *Devlin* alleged that he was personally injured by the provision of the settlement that he claimed was unfair—the elimination of certain retiree pension benefits. *Id.* at 6-7. Indeed, the Court noted that, unlike Craven here, "[t]he legal rights [the objector] seeks to raise are his own." *Id*. at 7.

Nothing in *Devlin* suggests that it altered the long-standing rule that "the party seeking review be himself among the injured." *Lujan*, 504 U.S. at 563. Moreover, Justice Scalia wrote a lengthy dissent in *Devlin* but did not address the majority's standing discussion. Given Justice Scalia's narrow reading of Article III standing, *see, e.g., Summers*, 555 U.S. at 493-501, if he believed the Court had departed from well-settled standing doctrine in the class action context he surely would have referenced that holding in his dissent.

Simply put, the Court's standing discussion in *Devlin* merely confirms that a showing of particularized, personal harm (like a retiree's objection to changes in his pension) is sufficient to establish standing for a class objector, just as it is for other litigants. 536 U.S. at 26-7. By contrast, the *Devlin* objector would not have

had standing to challenge the fairness of changes to the active employee pension benefits because, as a retiree, he would not be aggrieved by that portion of the settlement and thus would not have "a personal stake in the outcome." *Summers*, 555 U.S. at 493; *Glasser*, 645 F.3d at 1087-88.

For this same reason, Craven lacks standing to assert that the class settlement is unfair to other class members like James Kennerly and the *Two Shields* plaintiffs. (Craven Br. 24-25; Craven Reply Br. 10.) Craven only has a personal stake in her own settlement payments, not the payments to other class members. Because Craven neither alleged nor established that the settlement is unfair to her personally, she has established no injury-in-fact essential for Article III standing.

II. CRAVEN LACKS PRUDENTIAL STANDING TO PURSUE HER FAIRNESS OBJECTIONS.

Even if Craven's status as a class objector bound by the settlement constitutes an "injury" for purposes of Article III standing, Craven still lacks prudential standing to pursue her fairness objections. The prudential standing doctrine involves a series of court-created limitations on federal jurisdiction. *See American Immigration Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1357 (D.C. Cir. 2000). "[O]ne of the judicially self-imposed limits on the exercise of federal jurisdiction is the general prohibition on a litigant's raising another person's legal rights." *Id*. (internal quotation marks omitted). Thus, "even when the plaintiff has

alleged injury sufficient to meet the 'case or controversy' requirement, [the Supreme Court] has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). As the Court has further explained:

> "There are good and sufficient reasons for th[e] prudential limitation on standing when rights of third parties are implicated—the avoidance of the adjudication of rights which those not before the Court may not wish to assert, and the assurance that the most effective advocate of the rights at issue is present to champion them."

Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 15 n.7 (2004) (quotations and brackets in the original) (quoting *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 80 (1978)).

Here, Craven's fairness arguments rest entirely on the legal interests of third parties. As explained above, Craven does not contend that she is personally harmed by any of the allegedly unfair aspects of the class settlement. (Craven Br. 24-25; Craven Reply Br. 10.) Instead, Craven's fairness argument relies entirely on the settlement's effects on other class members like James Kennerly and the *Two Shields* plaintiffs. But Craven lacks prudential standing to assert claims based on those class members' legal interests, particularly where those class members were free to assert their own objections to the settlement but chose not to. *See*

Nordlinger v. Hahn, 505 U.S. 1, 10-11 (1992) (finding lack of prudential standing in constitutional right to travel case because "Petitioner has not identified any obstacle preventing others who wish to travel or settle in California from asserting claims on their own behalf"). Indeed, because no class member in the Kennerly or *Two Shields* category appealed the settlement's approval on these grounds, those class members presumably *prefer* the settlement over the alternative of further litigation and the risk of receiving no relief at all.[1] Thus, the objections that Craven is pressing are "directly adverse" to the interests of the class members she is purporting to represent, and therefore a finding of prudential standing would "be contrary to established Supreme Court case law." *Pony v. County of Los Angeles*, 433 F.3d 1138, 1148 (9th Cir.), *cert. denied*, 547 U.S. 1193 (2006).

Again, the Supreme Court's discussion in *Devlin* does not change this settled rule. As explained above, the *Devlin* objector was asserting his own concrete, particularized legal interest by opposing a class settlement that reduced his pension benefits. 536 U.S. at 5. Thus, although the Court held that "[b]ecause petitioner is a member of the class bound by the judgment, there is no question that he satisfies [prudential standing] requirements," the Court's holding was expressly premised

[1] Carol Good Bear, another class objector pursuing a separate appeal in *Cobell v. Salazar*, No. 11-5270 (D.C. Cir.), claims to be a member of the putative *Two Shields* class. But Good Bear opted out of the Trust Administration Class settlement in this case. (Craven App. 799.) Thus, Good Bear is not bound by that portion of the *Cobell* settlement and is free to pursue her mismanagement claim in the *Two Shields* litigation, eliminating any purported unfairness.

on the fact that "[t]he legal rights [the objector] seeks to raise are his own." *Id.* at 7. Craven, unlike the *Devlin* objector, seeks only to vindicate the legal interests of other class members whom she alleges are harmed by the settlement's theoretical unfairness. Thus, she lacks prudential standing and her fairness claims should be dismissed.

CONCLUSION

The Court should dismiss Craven's objections to the fairness of the settlement for lack of jurisdiction. Alternatively, for the reasons discussed in Plaintiffs' principal brief, the Court should reject those arguments on the merits and affirm the district court's finding that this historic class settlement is fair, reasonable, and adequate.

Respectfully submitted,

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DATED: February 13, 2012

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 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:

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