[ORAL ARGUMENT SCHEDULED ON MAY 15, 2012]
Nos. 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, Mary Aurelia Johns,
Objectors-Appellants,

v.

Kenneth Lee Salazar, Secretary of the Interior, *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE DEFENDANTS-APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici.

The named plaintiffs-appellees are Elouise Pepion Cobell, Thomas Maulson, James Louis Larose, and Penny Cleghorn. Ms. Cobell passed away on October 16, 2011. They represent two certified classes. The Historical Accounting Class consists of "those individual Indian beneficiaries (exclusive of those who prior to the filing of the Complaint on June 10, 1996 had filed actions on their own behalf stating a claim for a historical accounting) alive on the Record Date [September 30, 2009] and who had an IIM Account open during any period between October 25, 1994 and the Record Date, which IIM Account had at least one cash transaction credited to it at any time as long as such credits were not later reversed." JA ___ (Settlement Agreement ("SA") ¶ A.16). The Trust Administration Class consists of "those individual Indian beneficiaries (exclusive of persons who filed actions on their own behalf, or a group of individuals who were certified as a class in a class action, stating a [claim concerning the administration of trust funds or lands] prior to the filing of the Amended Complaint [on December 21, 2010]) alive as of the Record Date and who have or had IIM Accounts in the 'Electronic Ledger Era' (currently available electronic data in systems of the Department of the Interior dating from approximately 1985 to the present), as well as individual Indians who, as of the Record Date, had a recorded or other demonstrable ownership interest in land held in trust or restricted

status, regardless of the existence of an IIM Account and regardless of the proceeds, if any, generated from the Land." JA ___ (SA ¶ A.35).

The appellants are Carol Eve Good Bear, Charles Colombe, and Mary Aurelia Johns, none of whom were parties to the proceedings below, but all of whom filed objections to the class settlement agreement ultimately approved by the district court. All three appellants are members of the Historical Accounting Class. Ms. Johns is also a member of the Trust Administration Class; Ms. Good Bear and Mr. Colombe opted out of that class.

The defendants-appellees are Ken Salazar, as Secretary of the Interior; Larry Echohawk, as Assistant Secretary of Interior–Indian Affairs; and Timothy Geithner, as Secretary of Treasury, all named in their official capacities.

B. Rulings Under Review.

Good Bear, Colombe, and Johns have taken this appeal from the July 27, 2011 order entered by Judge Thomas F. Hogan in D.D.C. No. 96-1285, granting final approval to a class settlement agreement, and the final judgment entered on August 4, 2011. The district court's order and judgment are reproduced at JA ___ and __, respectively. The district court's underlying oral ruling is reproduced at JA ___.

C. Related Cases.

1. This Court has issued ten previous opinions concerning the *Cobell* case: *Cobell* v. *Salazar*, 573 F.3d 808 (D.C. Cir. 2009) (Nos. 08-5500 & 08-5506); *Cobell* v. *Kempthorne*, 455 F.3d 317 (D.C. Cir. 2006) (No. 05-5269); *Cobell* v. *Kempthorne*, 455 F.3d 301 (D.C. Cir. 2006) (No. 05-5388); *In re Kempthorne*, 449 F.3d 1265 (D.C. Cir. 2006) (No. 03-5288); *Cobell* v. *Norton*, 428 F.3d 1070 (D.C. Cir. 2005) (No. 05-5068); *Cobell* v. *Norton*, 392 F.3d 461 (D.C. Cir. 2004) (No. 03-5314); *Cobell* v. *Norton*, 391 F.3d 251 (D.C. Cir. 2004) (Nos. 03-5262 & 04-5084); *In re Brooks*, 383 F.3d 1036 (D.C. Cir. 2004) (Nos. 03-5047, 03-5048, 03-5049, 03-5050 & 03-5057); *Cobell* v. *Norton*, 334 F.3d 1128 (D.C. Cir. 2003) (No. 02-5374); *Cobell* v. *Norton*, 240 F.3d 1081 (D.C. Cir. 2001) (Nos. 00-5081 & 00-5084).

2. Pending before this Court in No. 11-5205 is a related appeal brought by another objector, Kimberly Craven, who also seeks to reverse the district court order approving the class settlement. That matter was orally argued before Judges Rogers, Tatel, and Brown on February 16, 2012, and has not yet been decided.

Two other appeals in this Court presented questions to this Court concerning the *Cobell* settlement. In No. 11-5229, the appellants voluntarily dismissed their appeal before briefing. In No. 11-5158, the Harvest Institute Freedmen Foundation and two individuals sought to appeal the denial of their motion to intervene in the

district court. This Court dismissed that appeal on December 29, 2011, and denied petitions for rehearing and rehearing en banc on March 1, 2012.

/s/ Thomas M. Bondy
THOMAS M. BONDY

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GLOSSARY

1994 Act	American Indian Trust Fund Management Reform Act of 1994
Br.	Objectors-Appellants' Brief
CFC	Court of Federal Claims
CRA	Claims Resolution Act of 2010
HAC	Historical Accounting Class
IIM Accounts	Individual Indian Money Accounts
JA	Joint Appendix
SA	Settlement Agreement
TAC	Trust Administration Class
Tr.	Transcript of Fairness Hearing and Oral Ruling (June 20, 2011)

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1346, and § 101(d) of the Claims Resolution Act of 2010 ("CRA"), Pub. L. No. 111-291, 124 Stat. 3064, 3066-67. The district court entered final judgment on August 4, 2011. JA ___. Timely notices of appeal were filed on September 30, 2011. JA ___; see Fed. R. App. P. 4(a). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court abused its discretion in approving the Congressionally authorized settlement of the *Cobell* Indian trust litigation.

STATUTES AND REGULATIONS

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

STATEMENT OF FACTS

At issue in this appeal is the district court's approval of the parties' settlement, authorized and ratified by an Act of Congress, of the long-running *Cobell* Indian trust litigation. See *Cobell* v. *Salazar*, 573 F.3d 808, 810 (D.C. Cir. 2009). We summarize here only the most salient aspects of the case. A related appeal, also seeking to challenge the *Cobell* settlement, was argued before this Court on February 16, 2012, and remains pending at this time. See *Cobell* v. *Salazar*, No. 11-5205 (D.C. Cir.).

I. Background

A. Individual Indian Money Accounts

The General Allotment Act of 1887, also known as the Dawes Act, 24 Stat. 388, ch. 119 (formerly codified at 25 U.S.C. § 331 *et seq*.), allotted tribal land to individual Indians, and related legislation provided that the Department of the Interior ("Interior") would hold those lands in trust and place certain revenues into individual accounts, known as Individual Indian Money accounts ("IIM accounts"). *Cobell* v. *Norton*, 334 F.3d 1128, 1133 (D.C. Cir. 2003). Billions of dollars have flowed through the IIM accounts since 1887, leaving an overall balance of $416.2 million as

of December 31, 2000. *Cobell* v. *Norton*, 428 F.3d 1070, 1072 (D.C. Cir. 2005); see *Cobell* v. *Kempthorne*, 532 F. Supp. 2d 37, 83 (D.D.C. 2008).

Over the past century, as land allotments passed to multiple heirs, ownership of the allotments has become increasingly "fractionated." *Babbitt* v. *Youpee*, 519 U.S. 234, 237 (1997). Multiple generations of inheritances yielded exponential growth in the number of individual interests in each allotment, which has "caused enormous administrative difficulties for the government." *Cobell*, 573 F.3d at 814 (internal quotation marks and brackets omitted). Beneficial ownership of the underlying lands is now shared among some four million interests, and Interior records individual ownership interests to the 42nd decimal point. H.R. Rep. No. 102-499, at 28 & n.94 (1992). Interior must divide each revenue receipt among what is often "dozens to more than 1,000 individual owners of a single allotment." *Cobell* v. *Norton*, 283 F. Supp. 2d 66, 182 (D.D.C. 2003). The result is that many account holders own interests in multiple fractionated allotments, and thousands of accounts have "little or no activity" and "balances less than $50." H.R. Rep. No. 102-499, at 28.

B. The 1994 Act

In 1994, Congress enacted the American Indian Trust Fund Management Reform Act ("the 1994 Act"), Pub. L. No. 103-412, 108 Stat. 4239 (codified at 25 U.S.C. §§ 162a(d) & 4001 *et seq*.). The 1994 Act set out various functions for

Interior, including "account[ing] for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian * * * ." 25 U.S.C. §§ 162a(d), 4011, 4043(a)(1) & (2).

The Act did not by its terms require the government to conduct an historical accounting to ensure that a century of transactions had been properly recorded. Congress had previously noted that it might cost "as much as $281 million to $390 million to audit the IIM accounts," and that, "[o]bviously, it makes little sense to spend so much when there was only $440 million deposited in the IIM trust fund for account holders as of September 30, 1991." H.R. Rep. No. 102-499, at 26 (1992).

II. The *Cobell* Litigation

A. Plaintiffs' Complaint

Plaintiffs commenced this class action in 1996 on behalf of present and former IIM account holders. Plaintiffs alleged that the government had breached its fiduciary duties and sought "wholesale improvement of [the Indian trust] program," *Cobell* v. *Norton*, 240 F.3d 1081, 1095 (D.C. Cir. 2001), including (1) a declaration that the government owed specific trust obligations and was in breach of those obligations; (2) an injunction compelling Interior and Department of Treasury officials to perform those obligations; and (3) an order requiring Interior to conduct an accounting of individual Indian trust accounts. See *Cobell* v. *Babbitt*, 52 F. Supp. 2d 11, 19 (D.D.C.

1999). The complaint also asked that plaintiffs be "'made whole'" by an order directing the government "'to restore trust funds wrongfully lost, dissipated, or converted.'" *Cobell* v. *Babbitt*, 30 F. Supp. 2d 24, 40 & n.16 (D.D.C. 1998). But to avoid dismissal of their complaint on jurisdictional grounds, plaintiffs later disavowed any claim for "cash infusions into the IIM accounts." *Id.* at 40.

B. Litigation Of The Accounting Claim

1. The Unreasonable Delay Ruling

In 1997, the district court certified a class, under Federal Rules of Civil Procedure 23(b)(1)(A) and (b)(2), of all current and former IIM account beneficiaries. *Cobell*, 30 F. Supp. 2d at 28. After a six-week trial, the court declared that the government had not fulfilled its duties. It determined, *inter alia*, that the 1994 Act required an historical accounting of all money in the IIM trust accounts, and that the accounting had been unreasonably delayed. *Cobell* v. *Babbitt*, 91 F. Supp. 2d 1, 29, 58 (D.D.C. 1999). The court "retained continuing jurisdiction over the case for the next five years," to monitor the accounting and other progress. *Cobell*, 240 F.3d at 1094; see *Cobell*, 91 F. Supp. 2d at 58.

This Court largely affirmed the district court's decision in 2001. This Court observed that "[t]here is no question" that the government had "made significant steps toward the discharge of [its] fiduciary obligations." *Cobell*, 240 F.3d at 1107. It held,

however, that the government was obliged to provide an historical accounting, which had been "unreasonably delayed" within the meaning of the Administrative Procedure Act. *Id.* at 1108. This Court upheld the district court's continuing oversight of the matter, reasoning that the district court has "broad equitable powers" — "'the power * * * to do equity and to mould each decree to the necessities of the particular case.'" *Id.* (quoting *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329-30 (1944)).

2. First Structural Injunction

In 2003, the district court held a second trial to consider proposed accounting plans. *Cobell,* 283 F. Supp. 2d at 85. Interior submitted a plan that would have cost an estimated $335 million. The court heard forty-four days of testimony and received over 500 exhibits before issuing a 214-page opinion. *Ibid*. It noted the extraordinary difficulty in completing an historical accounting given the effect of "fractionation." The court also observed that there are "approximately 195,000 boxes or containers of Indian trust records" in five different locations. *Id.* at 152-53. The court nevertheless issued a "structural injunction," with an estimated cost of $6-12 billion, requiring Interior to undertake a comprehensive effort to retrieve records and verify virtually every IIM account transaction since 1887. *Cobell* v. *Norton,* 392 F.3d 461, 465-66 (D.C. Cir. 2004).

Congress responded that this expensive accounting "would not provide a single dollar to the plaintiffs," H.R. Conf. Rep. No. 108-330, at 117 (2003); it would "displace funds available for education, health care and other services," *ibid.*, while "do[ing] almost nothing to benefit the Indian people." 149 Cong. Rec. S13,751, S13,784-85 (2003) (statement of Sen. Burns). Instead, Congress determined that "Indian country would be better served by a settlement of this litigation." H.R. Conf. Rep. No. 108-330, at 117. Accordingly, in 2003, Congress enacted Pub. L. No. 108-108, which imposed a spending moratorium and provided that the 1994 Act should not "be construed or applied to require the Department of the Interior to commence or continue historical accounting activities with respect to the Individual Indian Money Trust" until December 31, 2004, or until Congress amended the 1994 Act "to delineate the specific historical accounting obligations of the Department of the Interior with respect to the Individual Indian Money Trust." 117 Stat. 1241, 1263 (2003). Congress rejected the notion that, in passing the 1994 Act, it "'had any intention of ordering an accounting'" on the scale ordered by the district court; "individual legislators said in effect that the disparity between the costs of the judicially ordered accounting, and the value of the funds to be accounted for, rendered the ordered accounting, as one senator put it, 'nuts.'" *Cobell*, 392 F.3d at 466.

In light of Pub. L. No. 108-108, this Court vacated the structural injunction. *Id.* at 468. It noted that any delay in an accounting would not amount to an unconstitutional taking, because "the accounting is a purely instrumental right," and is not itself a form of "property." *Ibid*.

3. Second Structural Injunction

After Pub. L. No. 108-108 lapsed on January 1, 2005, the district court reissued its structural injunction. *Cobell* v. *Norton*, 357 F. Supp. 2d 298 (D.D.C. 2005). This Court again vacated the order, explaining that the language of the 1994 Act "doesn't support the inherently implausible inference that [Congress] intended to order the best imaginable accounting without regard to cost." *Cobell*, 428 F.3d at 1075. This Court elaborated that "neither congressional language nor common law trust principles (once translated to this context) establish a definitive balance between exactitude and cost." *Id.* at 1076. Although this Court declined to specify the precise parameters of the government's accounting obligation, it held that Interior could, at least for certain smaller transactions, use statistical sampling and match only a "sample of transactions to their supporting documentation." *Id.* at 1077-78.

4. Ancillary Proceedings And Assignment To New Judge

The litigation from 2003 through 2006 included a number of ancillary disputes. This Court twice reversed district court orders requiring disconnection of Interior's

computer systems from the Internet, ostensibly to preserve Indian trust data. *Cobell* v. *Norton*, 391 F.3d 251, 253-54 (D.C. Cir. 2004); *Cobell* v. *Kempthorne*, 455 F.3d 301, 302 (D.C. Cir. 2006). This Court likewise twice removed subsidiary judicial officers appointed by the district court to supervise the accounting process. *Cobell*, 334 F.3d at 1142; see *In re Kempthorne*, 449 F.3d 1265 (D.C. Cir. 2006); *In re Brooks*, 383 F.3d 1036 (D.C. Cir. 2004). This Court ultimately ordered the case assigned to a new district court judge. *Cobell*, 455 F.3d at 331-35. In doing so, this Court "close[d] with a warning to the parties," noting that five years after the first decision by this Court, "no remedy [was] in sight," and the parties should "work with the new judge to resolve this case expeditiously and fairly." *Id.* at 335-36.

C. The Impossibility And Restitution Rulings

1. The Impossibility Ruling

In October 2007, the district court held a ten-day trial to assess Interior's progress. The district court found that there were "substantial improvements in the administration of the trust." *Cobell*, 532 F. Supp. 2d at 86.

Discovery and ongoing auditing also revealed that at least some claimed problems with the trust had been exaggerated. For example, a 2004 project conducted by various accounting firms showed that assumptions that "records would be missing, erroneous, and in disarray" were "overblown," and that there were "far fewer errors

and missing records than [they] had expected to discover." *Id.* at 60. Indeed, Interior reconciled post-1985 transactions of $100,000 or more, representing about $483 million in throughput, and found a net overpayment of disbursements of $11,876 and a net underpayment of credits of $11,208. JA ___. Likewise, Interior reconciled a sample of 4,500 smaller value transactions, and found a net overpayment of $512. *Ibid.* These studies also confirmed, however, that reconciling individual account transactions would be even more costly than previously anticipated. See *Cobell*, 532 F. Supp. 2d at 50, 58, 60. They "revealed that reconciling a single transaction costs between $3,000–$3,500," even for small transactions. *Id.* at 58.

Looking ahead, the district court noted that "nineteen published opinions in this case have yielded no definitive, undisturbed ruling on the core question that looms over this dispute, which is: *What is the scope or nature of the accounting that is required by the 1994 Act?*" *Id.* at 42. The court noted the continuing challenges in establishing a feasible means of conducting an historical accounting, observing that the "[o]riginal cost and time estimates were off by several multiples," and that Congress had not appropriated the funds needed. *Id.* at 58.

The district court concluded on this basis that the accounting was "impossible." *Id.* at 102. This was not "because of missing records." *Id.* at 103 n.21. Rather, the

court explained, "the tension between the expense of an adequate accounting" and Congress's willingness to provide funds was determinative. *Ibid.*

2. The Restitution Ruling

In June 2008, the district court conducted another ten-day trial to explore other options. *Cobell* v. *Kempthorne*, 569 F. Supp. 2d 223, 225 (D.D.C. 2008). The court noted the tension between its "broad equitable authority * * * to fashion appropriate remedies" (citing *Cobell*, 240 F.3d at 1108-10), and "limits on federal courts * * * in suits against the government, including sovereign immunity and separation of powers." *Id.* at 225 (citing *Cobell*, 392 F.3d at 473). It highlighted many of the "benefits" achieved by the litigation, including improvements to the Indian trust system and development of a repository of trust records. *Id.* at 253. Ultimately, the court awarded $455.6 million in "restitution" to the class, based on a statistically possible but unproven difference between aggregate receipts and disbursements since the IIM accounts were first created in 1887. *Id.* at 225-27, 236-39, 252. The court stressed that there was "essentially no direct evidence of funds in the government's coffers that belonged in plaintiffs' accounts," and that "an accounting claim raised 121 years into the trust would ordinarily be prejudicially late." *Id.* at 238, 250.

This Court again vacated the district court's order. *Cobell*, 573 F.3d at 809. This Court held that although "the ideal concept of a complete historical accounting"

may be "impossible," *id.* at 814, the district court erred in proceeding from that conclusion to ordering that the government pay a "money judgment," *id.* at 813, which "it called a restitutionary award," *id.* at 810. Instead, this Court held, the district court should have ordered "Interior to provide the trust beneficiaries the best accounting possible, in a reasonable time, with the money that Congress is willing to appropriate," however imperfect such an accounting might be. *Id.* at 813. This Court held that the scope and method of the accounting remained a question for the district court, and clarified that the nature of the task on remand must be "'mould[ed]'" to the case and "adjusted in equity." *Id.* at 813. Thus, statistical sampling could be used for verifying transactions of all sizes, *id.* at 813-14, and, in crafting any further orders, the district court was to consider "whether the cost to account will exceed the amount recovered by class beneficiaries," *id.* at 814.

III. The Parties' Settlement

In July 2009, following this Court's tenth published decision in the matter, with no end to the litigation in sight and mindful of this Court's admonition that they work together "to resolve this case expeditiously and fairly," *Cobell*, 455 F.3d at 335-36, the parties renewed settlement discussions. After five months, the parties announced a tentative settlement. The settlement was expressly contingent on Congressional legislation authorizing the parties' agreement. JA ___ (SA ¶ B.1).

The settlement requires government funding in excess of $3.4 billion. Pursuant to the settlement, $1.512 billion is to be paid into an "Accounting/Trust Administration Fund," and is to be used to settle two kinds of claims, corresponding to two overlapping plaintiff classes. JA ___ (SA ¶ A.1) (providing $1.412 billion); CRA § 101(a)(9), (j) (adding $100 million). The settlement provides for the filing of an amended complaint setting out both classes. JA ___ (SA ¶ B.3), JA ___ (SA Exhibit B). In addition, the government committed the further sum of $1.9 billion to purchase and consolidate fractionated land interests. JA ___ (SA ¶ F); CRA § 101(e).

The "Historical Accounting Class" (HAC) consists of those "who had an IIM Account open during any period between October 25, 1994 and the Record Date [September 30, 2009], which IIM Account had at least one cash transaction credited to it." JA ___ (SA ¶ A.16). In lieu of receiving an historical statement of account, each of the estimated 360,000 members of the class receives instead a $1,000 payment. JA ___ (SA ¶ E.3.a). As a class certified under Federal Rule of Civil Procedure 23(b)(1)(A) and (b)(2), no opt-out is available. JA ___ (SA ¶ C.2.a).

The "Trust Administration Class" (TAC) consists of individuals with claims for money damages stemming from the alleged mismanagement of trust assets who held IIM Accounts at any time between 1985 and the present, as well as individual Indians who, as of the Record Date, had an ownership interest in restricted or trust land. JA

___ (SA ¶ A.35); see also JA ___ (SA ¶ A.14), JA ___ (SA ¶ A.21). All members of the HAC also meet the requirements of TAC class membership. Unlike the Historical Accounting Class, the Trust Administration Class is an opt-out class; members of the TAC could opt out within 90 days of the class notice. JA ___ (SA ¶ C.2.b), JA ___ (Modification of SA, ¶ 8). On top of the $1,000 HAC payment, those who did not opt out receive a base TAC payment of at least $500, plus a further, *pro rata* share of the class funds based upon "the average of the ten * * * highest revenue generating years in each individual Indian's IIM Account." JA ___ (SA ¶ E.4.b.3). Congress created a separate fund of $100 million to increase the minimum TAC payment to around $850. CRA § 101(j).

The settlement provides for a broad but limited release of claims. Claims for payment of account balances in existing accounts, claims for breaches committed after the record date, and claims for future trust reform are not released. JA ___ (SA ¶ I.3). Under the settlement, historical accounting claims are released. JA ___ (SA ¶ I.1). Thus, class members who do not opt out of the TAC to pursue individual damages actions accept the balance in the last 2009 account statement. JA ___ (SA ¶ I.8). Persons opting out of the TAC remain free to pursue individual damages claims for alleged lands or funds mismanagement. JA ___ (SA ¶ I.7). In pursuing such actions, claimants remain "entitled to all methods of proof, applicable evidentiary

presumptions and inferences (if any), and means of discovery available in any court of competent jurisdiction." *Ibid*. This includes, "without limitation," the right to an "accounting in aid of the jurisdiction of a court to render judgment." *Ibid*.

IV. Congressional Authorization Of The Settlement

In December 2009, the President announced the parties' settlement agreement. Months of debate in the House and Senate followed. In December 2010, the President signed into law the Claims Resolution Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064.

The Act provides that the agreed-upon settlement of this case "is authorized, ratified, and confirmed," CRA § 101(c)(1). The Act also appropriates funds necessary to implement the settlement, *id.* § 101(e), (j); amends the district court's jurisdiction to permit the matter to proceed, *id.* § 101(d); provides that "[n]otwithstanding the requirements of the Federal Rules of Civil Procedure," the court "may certify the Trust Administration Class" and the TAC shall thereafter "be treated as a class certified under Rule 23(b)(3)," *id.* § 101(d)(2); and makes settlement payments tax-free, *id.* § 101(f).

V. The District Court's Approval Of The Settlement And Entry Of Final Judgment

On December 21, 2010, the district court granted preliminary approval of the parties' settlement. JA ___. Pursuant to the terms of the agreement, the court ordered an expansive program of class notice and invited objections to the settlement, allowing objections through April 20, 2011. JA ___.

A. Class Notice

The parties retained a preeminent notice expert with experience managing 600 large class action settlements. Along with a claims administrator, the parties designed a program that provided notice through multiple channels to reach the hundreds of thousands of potential class members. Notice included direct mailings; an extensive web presence at www.indiantrust.com; a toll-free number with recorded information and a live call center; an informational video distributed in nine languages; print and broadcast media advertisements; and distribution of information through Bureau of Indian Affairs agencies, schools, nursing homes, non-profits, religious organizations, tribal colleges, tribal courts, and Indian Health Service facilities. See generally JA ___ (Keough Decl.; Kinsella Decl.). Media coverage of the settlement, including remarks by the President, the Secretary of the Interior, Members of Congress, the lead plaintiffs, and class counsel, further publicized the agreement.

B. Objections

Out of approximately 500,000 class members, there were 92 objections from individuals and groups. JA ___ (Transcript of Fairness Hearing and Oral Ruling ("Tr.") 237). The three appellants here, Carol Eve Good Bear, Charles Colombe, and Mary Aurelia Johns, are IIM account holders who filed timely objections. Ms. Good Bear and Mr. Colombe opted out of the Trust Administration Class; Ms. Johns did not. See JA ___ (Dist. Ct. Docs. No. 3850 (order) & 3850-1, at 3, lines 86 & 104 (including Colombe and Good Bear's names on the list of objectors excluded from the Class)).

C. Fairness Hearing And Final Approval

On June 20, 2011, the district court held a fairness hearing. The court heard arguments from the parties, JA ___ (Tr. 141-209), and also allowed any objector who wished to be heard to present arguments against the settlement, including appellants Good Bear and Johns. JA ___ (Tr. 33-137).

The court then rendered an oral ruling so that "those who have traveled so far" could "hear the ruling of the court and understand" what the court had decided "and why." JA ___ (Tr. 209). The court explained that following years of "major litigation warfare" and this Court's tenth decision, "[t]he parties were trying to find out where to go next." JA ___ (Tr. 212-13). They faced additional "years of litigation," and

under "the law * * * developed by our Circuit," the plaintiffs had "rather dubious chances of ultimate success." JA ___ (Tr. 213-14).

In considering whether the settlement was fair, adequate, and reasonable, the court focused on what relief the plaintiffs could have expected had they continued with the litigation. Considering "the strength of the plaintiffs' case," JA ___ (Tr. 235), the court concluded that "a better result" was not likely. JA ___ (Tr. 218, 235). Moreover, the court explained, even if "there had been eventually an accounting ordered" at all, it likely would have been "some type of generic accounting," which would have been of limited utility. JA ___ (Tr. 217-18). The court found that the settlement, by contrast, provides ample and immediate benefits, and if the case continued, there could be "interminable litigation" easily stretching "another 15 years." JA ___ (Tr. 236). And even once some form of accounting were complete, to obtain any monetary relief, "each individual plaintiff would have to sue in the Court of [Federal] Claims," where, the court stressed, success would be "difficult." JA ___ (Tr. 218, 237). The court also observed that unlike a typical class settlement, this was the product of "a true arm's-length hard-fought battle" and followed years of litigation and extensive discovery. JA ___ (Tr. 237). The court stated that it "cannot conclude in the final balance" that the settlement "is anything but fair," JA ___ (Tr. 218-19),

explaining as well that the classes were properly certified and that any due process concerns were amply satisfied, JA __ (Tr. 227-33).

On July 27, 2011, the district court issued a written order approving the settlement, echoing its oral ruling. JA ___. On August 4, 2011, the court entered final judgment. JA ___.

SUMMARY OF ARGUMENT

The parties to this long-running and contentious litigation asked the district court to approve a Congressionally ratified settlement agreement, which brings this controversy to a close and provides nearly $3.5 billion for Indian trust beneficiaries. After conducting a hearing and considering various objections, the district court approved the agreement, finding that it was fair, adequate, and reasonable. The district court's judgment reflects no abuse of discretion, and should be upheld.

The settlement resolves a long and hard-fought dispute, and was entered into at arm's length. The settlement provides for a payment of $1,000 to each of the estimated 360,000 members of the Historical Accounting Class, for a total disbursement of approximately $360 million. The settlement also dedicates an unprecedented sum — approximately $1 billion — to pay for potential trust administration claims. And the settlement further commits another $1.9 billion for the acquisition and consolidation of fractionated land interests, a step that all agree is

essential to rational trust reform. The settlement is generous in relation to the strength of plaintiffs' case, allowed members of the Trust Administration Class to opt out if they so chose, and is overwhelmingly in the public interest.

Nor is this a run-of-the-mill settlement. The settlement was expressly contingent on Congressional legislation. Congress enacted the requisite statutory provisions, and, in so doing, appropriated billions of dollars to fund the settlement and amended the district court's jurisdiction to enable the court to proceed. Under the circumstances, the district court properly exercised its discretion in approving a settlement that Congress explicitly "authorized, ratified, and confirmed." CRA §101(c)(1). This conclusion holds all the more true in light of Congress's preeminent role in Indian trust matters, and its specific role as settlor of the IIM trusts.

Appellants' limited arguments to the contrary, some of which are already pending before this Court in *Cobell* v. *Salazar*, No. 11-5205 (D.C. Cir.) (argued Feb. 16, 2012), are meritless. Their lead argument is that "settlement class actions" are inherently unconstitutional. But no court has ever accepted that argument, and appellants present no reason for this Court to do so. Indeed, this is not, in any event, a "settlement class action" in any normal sense of that term. This is not a matter that was settled on the day it was filed. This case was commenced many years ago, in 1996, and has been the subject of heated, adversarial litigation ever since. At least in

the context of the *Cobell* litigation, appellants' abstract attack on "settlement class actions" is largely beside the point.

Nor was Judge Hogan required to disqualify himself based on statements he made in October 2010. Contrary to appellants' assertion, those statements were not made "out-of-court." They were made from the bench, on the record, during a status conference with counsel. In the cited remarks, Judge Hogan asked the parties to extend their agreed-upon deadline for Congressional legislation needed to enable the settlement to proceed, and expressed the hope that Congress would act. There was nothing in any way improper in these statements. Especially taking into account the entire context of this case, no reasonable observer could conclude that Judge Hogan would not conduct himself impartially in considering objections and assessing the fairness of the parties' agreement. Recusal was plainly uncalled for.

Appellants' objection to the settlement on fairness grounds rests upon a misunderstanding of the nature and terms of the parties' agreement. Appellants urge that this Court has "already agreed" that, on its merits, the settlement is unfair. They rely on this Court's 2009 decision vacating the district court's holding that an historical accounting is impossible and its order that the government pay "restitution." But the question for present purposes is whether the parties' agreed-upon settlement, authorized and ratified by Congress, is fair. That question could not have been and

was not before this Court in its 2009 ruling, which was issued prior to the existence of any settlement.

In focusing on the settlement's payment of $1,000 to each member of the Historical Accounting Class, appellants misapprehend what the $1,000 payments represent. The settlement's per capita payment of $1,000 to each member of the Historical Accounting Class is a substitute for an historical accounting, pursuant to a Congressionally authorized settlement that extinguishes altogether any obligation to furnish such an accounting. The payment is not intended as compensatory damages for any individual harm, as the district court properly explained.

And crucially, by definition, every person in the Historical Accounting Class is also a member of the Trust Administration Class. Under the settlement, every Trust Administration Class member who did not opt out of the class will receive, over and above the basic $1,000 HAC payment, an additional baseline amount of approximately $850, and that amount will then be adjusted upwards even further, based on the highest ten years of receipts in a class member's IIM account(s), from 1985 to 2009. Thus, class members who elected not to opt out of the Trust Administration Class will receive supplemental, and potentially sizeable, individualized payments keyed to the nature and scope of their account transaction activity. The settlement thus offers fair and ample payments on potential trust

administration claims to hundreds of thousands of individual Indians, without requiring any of them to incur the considerable risks and expense of prosecuting those claims.

Finally, appellants inaptly seek to question the certification of the Trust Administration Class. In the Claims Resolution Act, Congress expressly exempted the Trust Administration Class from the certification requirements of Rule 23. The only limitation on the district court's discretion to certify the class — Due Process — was amply satisfied. The judgment of the district court was proper in all respects, and should be affirmed.

STANDARD OF REVIEW

"This court reviews the district court's decision" to approve a class action settlement "for abuse of discretion, which allows for reversal only if the district court applied the wrong legal standard or relied on clearly erroneous findings of fact." *In re Vitamins Antitrust Class Actions*, 327 F.3d 1207, 1209 (D.C. Cir. 2003). An objector "bears the burden" of "making a 'clear showing' that an abuse of discretion has occurred." *Pigford* v. *Glickman*, 206 F.3d 1212, 1217 (D.C. Cir. 2000).

ARGUMENT

I. The District Court Was Well Within Its Discretion To Approve The Settlement Agreement.

A. The Settlement Is Fair, Adequate, And Reasonable.

1. Although this Court has eschewed any particular formula for evaluating class settlements, it has emphasized that district courts must consider whether the settlement was "the product of collusion between the parties" and must "evaluate the terms of the settlement in relation to the strength of the plaintiffs' case." *Thomas* v. *Albright*, 139 F.3d 227, 231 (D.C. Cir. 1998). A settlement is not unreasonable simply because class members may receive less than they would have received had they "prevailed after a trial." *Ibid.* Nor is a settlement unfair because the interests of class members may vary or some class members may benefit more from the settlement than others. See *id.* at 231-33. Rather, the court must consider "the interests of the class as a whole." *Id.* at 232.

The district court here found no hint of collusion. JA ___ (Tr. 239). The settlement was the result of "a true arm's-length hard-fought battle" between the parties. JA ___ (Tr. 237); see also JA ___ (Tr. 234). Where, as here, a settlement is "reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery," there is "a presumption of fairness, reasonableness, and

adequacy." *McReynolds* v. *Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009); *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 32-33 (1st Cir. 2009).

The district court carefully considered the terms of the settlement in relation to the strength of plaintiffs' case. By the time of the parties' agreement, it was clear that, even if plaintiffs were to prevail in the underlying litigation, they would be entitled, at most, to what the district court described as "some type of generic accounting." JA ___ (Tr. 217). As this Court has stressed, however, the asserted right to an accounting is not itself property. *Cobell*, 392 F.3d at 468. Rather, it is "a purely instrumental right" — a piece of information consisting, in this case, of an historical statement of account. *Ibid.* And especially given the costs and uncertainties involved, Congress could have simply repealed any historical accounting obligation altogether. See *ibid.*; see also *United States* v. *Jicarilla Apache Nation*, 131 S. Ct. 2313, 2329 n.9 (2011). Further, even as it stood, any accounting was likely to be of limited utility. The precise nature and scope of any historical accounting obligation remains largely unresolved to this day, even after years of litigation. See *Cobell*, 573 F.3d at 813. And, as this Court has held, any eventual accounting would be controlled by Congress's willingness to fund the project, would employ substantial statistical sampling, and would as a practical matter be constrained by other parameters as well. *Id.* at 811, 814.

It is likewise entirely unproven, after years of litigation, that whatever historical statements of account may ultimately have been required would have revealed significant errors in the overall handling of IIM accounts, much less any errors at all with respect to any particular account. To the contrary, the record indicates that variances, if any, were small. See, *e.g.*, *Cobell*, 532 F. Supp. 2d at 60; JA ___.

And, significantly, the district court would have had no authority in the ongoing litigation to award monetary relief. As the district court found, had any class members wanted to seek monetary relief, they would have had to bring new litigation, which would likely take years to resolve, with highly uncertain prospects of recovery, even assuming applicable statutes of limitations and other obstacles could be overcome. JA ___ (Tr. 218, 237).

Against this backdrop, the settlement is generous. It provides each Historical Accounting Class member with $1,000 (tax-free and without prejudice to public assistance programs) in exchange for releasing Interior from any obligation to furnish historical statements of account. This compromise is especially fair and reasonable, given that the aggregate costs of undertaking and completing any requisite historical accounting task may have proved exorbitant; provision of historical statements of account would not necessarily have revealed any significant discrepancies; and continuing district court litigation could not and would not have resulted in any

monetary recovery at all. There are an estimated 360,000 members in the Historical Accounting Class, so the $1,000 payments amount in the aggregate to $360 million.

Moreover, by definition, every person in the Historical Accounting Class is also a member of the Trust Administration Class. Under the settlement, TAC members are entitled to additional, individually calculated payments, tied in part to factors such as the size and degree of transaction activity in a person's IIM accounts. See JA ___ (SA ¶ E.4.b.3). Individual compensation for TAC members is expected to range from a low of $850 to a high, for some individuals, of tens or hundreds of thousands of dollars, or even over $1 million. TAC payments alone will likely come to a total of approximately $1 billion.

The Trust Administration Class also features a full and robust opt-out right. Thus, any class member dissatisfied with the proposed settlement terms could pursue an independent monetary claim for trust mismanagement by opting out of the TAC, thereby preserving whatever damages claims he or she may have possessed under existing law. Those individuals who opted out of the TAC — including appellants Good Bear and Colombe here — remain "entitled to all methods of proof, applicable evidentiary presumptions and inferences (if any), and means of discovery available in any court of competent jurisdiction." JA ___ (SA ¶ I.7). That includes, "without limitation," the right to an "accounting in aid of the jurisdiction of a court to render

judgment."[1] *Ibid.* Thus, in no way does the settlement "preclude absent class members from bringing their own individual lawsuits for monetary damages" if they prefer to do so. *In re Veneman*, 309 F.3d 789, 795 (D.C. Cir. 2002).

And, of special note, although Historical Accounting Class members waive whatever rights they may have had with respect to the receipt of a one-time historical statement of account, the settlement waives no prospective accounting rights at all. See JA ___ (SA ¶ I.3). With respect to any substantive claims for funds or lands mismanagement, the settlement likewise imposes no mandatory waiver of any rights of any kind, whether prospective or retrospective in nature. See *ibid*.

2. In approving the settlement, the district court properly considered not only its cumulative terms and benefits to the class, but also the stage of litigation, the reaction of the class, and the public interest underlying the settlement. See Adv. Comm. Notes on Fed. R. Civ. P. 23; *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 350 (3d Cir. 2010); *McReynolds* v. *Richards-Cantave*, 588 F.3d 790, 804 (2d Cir. 2009); *Moulton* v. *U.S. Steel Corp.*, 581 F.3d 344, 349 (6th Cir. 2009).

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[1] See *Klamath & Modoc Tribes* v. *United States*, 174 Ct. Cl. 483, 491 (1966); see, *e.g.*, *Yankton Sioux Tribe* v. *United States*, 84 Fed. Cl. 225, 235 (2008); *Doe* v. *United States*, 61 Fed. Cl. 453, 457-58 (2004); see also *E. Shawnee Tribe of Okla.* v. *United States*, 582 F.3d 1306, 1308 (Fed. Cir. 2009), vacated on other grounds, 131 S. Ct. 2872 (2011) (mem.).

After 15 years of discovery and fact finding, the parties and the district court had an unusually well-developed understanding of the case. They also had the benefit of several opinions by this Court. Thus, the settlement was crafted, and approved, with full awareness of the record and the risks and uncertainties of further litigation.

The reaction of the class was decidedly favorable. Following the parties' extensive notice effort, the court received only 92 objections out of a cumulative pool of approximately 500,000 persons. To put this in perspective, a settlement can be fair even if "a significant portion of the class" objects. *Thomas*, 139 F.3d at 232 (15%); see, *e.g.*, *Grant* v. *Bethlehem Steel Corp.*, 823 F.2d 20, 23 (2d Cir. 1987) (36%); *Cotton* v. *Hinton*, 559 F.2d 1326, 1332-33 (5th Cir. 1977) (50%); *Bryan* v. *PPG Indus., Inc.*, 494 F.2d 799, 803 (3d Cir. 1974) (20%). Here, the objection rate was 0.018%. The fact that "only a small number of objections are received" is not dispositive, but it is "indicative of the adequacy of the settlement." 4 Newberg on Class Actions § 11.41 (4th ed. 2002).

The settlement is also overwhelmingly supported by the public interest. Over and above the separate HAC and TAC compensation mechanisms, the government agreed to establish an additional fund of $1.9 billion to acquire and consolidate fractionated land interests, thus substantially facilitating substantive trust reform and

further aiding trust beneficiaries. See JA ___ (SA ¶ F); CRA § 101(e).[2] The settlement also provides tens of millions of dollars in funding for scholarships for Native Americans, to help enhance educational opportunities in under-served communities. See JA ___ (SA ¶ G). Finally, the settlement relieves the government, the courts, and the taxpayers of the burden of continuing with what Judge Lamberth described as "one of the most complicated and difficult cases ever to be litigated in" the District of Columbia. JA ___; see *Mayfield* v. *Barr*, 985 F.2d 1090, 1092 (D.C. Cir. 1993) (noting the strong policy of "encouraging settlements, particularly in class actions, which are often complex, drawn out proceedings demanding a large share of finite judicial resources"). Especially considering the matter in its full context, the district court plainly committed no abuse of discretion in upholding the historic settlement of this long-running case, a settlement expressly authorized and ratified by Congress.

[2] A tract identified in *Hodel* v. *Irving*, 481 U.S. 704 (1987), illustrates the complexities and costs of administering fractionated lands: Tract 1305 consisted of 40 acres, had 439 owners, and produced $1,080 annually. The Bureau of Indian Affairs estimated annual administrative costs of handling this tract at $17,560. *Id*. at 713.

B. Congress Expressly Authorized, Ratified, And Confirmed The Settlement.

"The benefits [a class] might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 622 (1997). Working within the framework of the pending litigation, the Claims Resolution of 2010 Act expressly provides that the agreed-upon settlement of this case "is authorized, ratified, and confirmed." CRA § 101(c)(1). Among other detailed provisions pertaining to this matter, the Act also appropriates funds necessary to implement the settlement, *id.* § 101(e), (j); amends the district court's jurisdiction to allow the matter to proceed, *id.* § 101(d)(1); and provides that "[n]otwithstanding the requirements of the Federal Rules of Civil Procedure," the court "may certify the Trust Administration Class," *id.* § 101(d)(2)(A).

Congress's explicit authorization and ratification of the settlement weighs decisively in favor of the district court's determination to approve the settlement. Congress rendered a judgment "deliberately expressed in legislation," which properly informed the district court's discretion. *Virginian Ry. Co.* v. *Ry. Employees*, 300 U.S. 515, 551 (1937). And Congress's action is especially significant in light of its exclusive authority over waivers of sovereign immunity. See, *e.g.*, *Cobell*, 240 F.3d

at 1094-95. Any eventual historical accounting ordered by the district court would ultimately be subject to Congressional control, see *Cobell*, 392 F.3d at 465-66, 468, and any future damages claims here would be "available by grace and not by right," *United States* v. *Tohono O'Odham Nation*, 131 S. Ct. 1723, 1731 (2011).

Congress also plays a distinctive role with respect to Indian trust matters. Here, in particular, Congress is "the settlor of the IIM trust, which ultimately establishes the contours of the United States' (and its delegates') fiduciary duties." *Cobell*, 91 F. Supp. 2d at 50; see *Cobell*, 283 F. Supp. 2d at 268 ("Congress, the settlor of the IIM trust, * * * expressly delegat[ed] the United States's administration of the IIM trust to the Interior and Treasury Departments"); see also *Jicarilla Apache Nation*, 131 S. Ct. at 2329 n.9 ("Indian trusts resemble revocable trusts at common law because Congress has acted as the settlor in establishing the trust and retains the right to alter the terms of the trust by statute, even in derogation of tribal property interests.").

Indeed, Congress's legislative judgments in this area are due the highest respect. As the Supreme Court has explained, "[i]n the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands. * * * Of necessity, the United States assumed the duty of furnishing th[em] protection, and with it the authority to do all that was required to perform that obligation * * * ." *Bd. of County Comm'rs* v. *Seber*, 318 U.S. 705, 715 (1943). Thus, "the organization

and management of the [Indian] trust[s] is a sovereign function subject to the plenary authority of Congress," and "the power has always been deemed a political one." *Jicarilla Apache Nation*, 131 S. Ct. at 2323-24 (internal quotation marks omitted).

In *Littlewolf* v. *Lujan*, 877 F.2d 1058 (D.C. Cir. 1989), for example, this Court confronted a statute settling disputed land claims with Indians in exchange for compensation fixed by the statute or, if the claimant elected, a judicially determined amount of compensation. *Id.* at 1059. Although the Court independently evaluated whether the statute was constitutional, it deferred to "Congress' plenary power over Indian affairs" and its reasoned, legislative judgment that had "balanced the competing interests" at stake, "in light of complex historical, legal, economic, and social factors." *Id.* at 1063.

Similar considerations are present in this case, and they underscore that the district court properly approved the settlement. The settlement agreement here was extraordinary in that it was expressly contingent on Congressional action. Congress undertook the requisite legislation, and, in so doing, appropriated billions of dollars to fund the settlement and amended the district court's jurisdiction to enable the court to proceed. Under the circumstances, the district court abused no discretion in approving the settlement that Congress had "authorized, ratified, and confirmed." CRA §101(c)(1).

II. Appellants' Objections Are Without Merit.

The three appellants here raise only limited objections to the settlement. Some of the same issues presented in this appeal are already pending before this Court in *Cobell* v. *Salazar*, No. 11-5205 (D.C. Cir.), argued on February 16, 2012. In any event, the arguments are without merit.

A. The District Court Did Not Violate Article III.

Colombe and Johns contend that the district court lacked jurisdiction to approve the settlement because no Article III "case or controversy" existed once the parties agreed in 2009 to settle this litigation. Their argument amounts to a cursory but sweeping attack on so-called "settlement class actions," which they suggest are "inherently unconstitutional." Br. 14-15. No court has ever held as much, and this appeal presents no occasion for this Court to do so.

1. The general validity of "settlement class actions" is not at issue here. "Settlement class actions" are those in which, "within the space of a single day," class representatives and a defendant first "present[] to the District Court a complaint, an answer, a proposed settlement agreement, and a joint motion for conditional class certification." *Amchem*, 521 U.S. at 601-02. Here, by contrast, the district court approved a settlement resolving a case that had been filed fifteen years earlier, on behalf of a plaintiff class that had been certified fourteen years earlier. Appellants

appear to acknowledge as much, Br. 14, and there can be no serious question that this active, ongoing, and hard-fought litigation has presented an Article III "case or controversy" since the day it was initiated in 1996.

Nor did this action cease to be a "case or controversy" when the complaint was amended, as part of the settlement, to include intertwined damages claims. From the beginning, plaintiffs have sought both to receive an historical accounting and to be "'made whole'" for any alleged governmental "'breach of trust.'" *Cobell*, 30 F. Supp. 2d at 39 (quoting complaint). Because the government had not waived sovereign immunity with respect to any monetary claims, plaintiffs early on disavowed any interest in "cash infusions into the IIM accounts." *Id.* at 40 & n.16. It has nevertheless been clear throughout that plaintiffs desired an historical accounting not only as an end in itself, but also as a means, to the extent possible, for individuals to attempt to state claims for monetary damages, at some point, in a court with appropriate jurisdiction. That is why numerous experts and countless days of trial were devoted to analyzing not only how Interior might be able to produce an historical accounting, but also whether and to what extent any trust funds may actually have been unaccounted for. See generally *Cobell*, 532 F. Supp. 2d at 56-86; *Cobell*, 569 F. Supp. 2d at 228-40. And that is why in 2008 the district court purported (albeit, incorrectly) to award as "restitution" the maximum amount that could possibly be

found "missing from the stated balance of the IIM trust." *Id*. at 252. Put simply, both the accounting and damages aspects of the settlement reflect, as a practical matter, years of "litigation warfare." JA ___ (Tr. 212-13).

2. Even if this case were deemed to present a "settlement class action," the district court was in any event well within its constitutional authority to approve the settlement. Appellants cite no judicial decision holding that a settlement class is "inherently unconstitutional," and we are aware of none. To the contrary, the "'settlement only' class has become a stock device" that is now widely used and accepted. *Amchem*, 521 U.S. at 618; see Manual for Complex Litigation, Fourth, §§ 21.132, 21.612.[3]

To be justiciable, a case "must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 241 (1937). It "must be definite and concrete, touching the legal relations of parties having adverse legal interests." *Id.* at 240-41.

[3] Appellants rest their argument on a single law review article. Br. 14-15. They also cite a Third Circuit decision, but that case specifically holds that settlement classes are cognizable under Fed. R. Civ. P. 23. *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 794 (3d Cir. 1995). That decision was later embraced in significant respects by the Supreme Court in *Amchem*, see 521 U.S. at 609, 618-20.

A typical settlement class action, at least absent bad faith or other similar circumstances, meets those basic criteria. Such a case arises from a "definite and concrete," not "hypothetical," set of facts that the parties dispute. The plaintiffs wish to maximize their recovery while the defendants aim to limit their liability. Regarding the merits of the case, they may not agree on anything. Yet they may both rationally decide that a negotiated outcome is preferable to the costs and uncertainties of litigation, and thus they may settle early on in the litigation, even at the very beginning.

When, as in the class action context, the parties are required to obtain court approval to make their agreement effective, the court is empowered to grant that approval notwithstanding the parties' decision to compromise with respect to the underlying merits of the action. That is so because the merits of the underlying dispute become moot only *after* the settlement is approved and, by its terms, triggers a release of the plaintiffs' claims. That the parties have contingently "settled on a measure of damages" does not alter their adversity with respect to those claims. See *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 371 (1982).[4]

[4] See also *In re Asbestos Litigation*, 90 F.3d 963, 988 (5th Cir. 1996), vacated on other grounds sub nom., *Flanagan* v. *Ahearn*, 521 U.S. 1114 (1997) (mem.) ("The parties in *Ahearn* filed their proposed settlement agreement on the same day as the plaintiff class filed its complaint so they clearly did not intend to litigate the (continued...)

Here, for example, plaintiffs and the government have never agreed on the precise scope of any historical accounting obligation, on whether and to what extent any fiduciary duties may have been breached, or on whether and in what amounts any damages might be recoverable in connection with potential trust mismanagement claims. Those and other issues have been hotly disputed and would likely continue to be disputed but for the settlement agreement. There can be little doubt, in these circumstances, that plaintiffs' claims "touch[] the legal relations of parties having adverse legal interests." *Aetna*, 300 U.S. at 240-41.

To the extent appellants' objection is that this case lacks the requisite adversity with respect to the terms of the settlement itself because the parties agree on those terms, appellants' presence and role in these appeals conclusively refutes their contention. In any class action settlement, the parties' interests in settling may be perceived as adverse to the interests of some absent class members who would prefer that the underlying litigation continue. When those absent class members properly

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[4](...continued)
complaint. However, this does not change the adversarial nature of the disputes which the settlement resolves and does not contradict the district court's finding that settlement negotiations were heated, difficult and conducted at arm's length. * * * *Ahearn* was a class action that could not be settled without court approval so the parties' agreement to settle the case did not make it moot."); cf. *Swift & Co.* v. *United States*, 276 U.S. 311 (1928) (rejecting an Article III challenge to a consent decree that was agreed upon prior to the filing of the complaint and was submitted to the district court for approval along with the complaint).

lodge objections under applicable procedures, as appellants did here, they present a "concrete" dispute over the reasonableness and adequacy of the settlement, an issue that the courts may properly resolve. This matter plainly presents an Article III "case or controversy," and nothing in appellants' perfunctory presentation even remotely demonstrates otherwise.

B. Judge Hogan Was Not Required To Disqualify Himself.

Johns argues that Judge Hogan should have disqualified himself prior to the fairness hearing because the "out-of-court views [he] expressed" call his impartiality into question. Br. 16. This Court reviews a district judge's refusal to recuse for abuse of discretion. *SEC* v. *Loving Spirit Found. Inc.*, 392 F.3d 486, 493 (D.C. Cir. 2004). Judge Hogan was well within his discretion to deny Johns's request. See JA ___ (Tr. 138-39). The request is based on a mistake of fact — the cited statements were spoken in court — and it is without basis at any rate.

1. Johns cites statements Judge Hogan made on October 15, 2010, encouraging Congress to enact the Claims Resolution Act after the proposed legislation had been pending for nearly a year. Contrary to Johns's assertion, those statements were not made "out-of-court." They were made from the bench, on the record, during a status conference with counsel. See JA ___ (10/15/10 Tr. 3-10). The conference was called

because the proposed settlement had been set to expire that day if the necessary legislation had not yet been enacted. See JA ___ (SA ¶¶ A.22, B.1) (setting Legislation Enactment Deadline); JA ___ (Doc. 3660-11 at 3) (extending deadline to Oct. 15, 2010). Judge Hogan explained that, although the House had passed the legislation upon which the settlement was contingent, the Senate had not yet acted. JA ___ (10/15/10 Tr. 3-4). He noted that the December 2010 "lame duck session * * * may be the last opportunity that is presented to approve this before we would have to go back into litigation." JA ___ (10/15/10 Tr. 4). He therefore "asked the parties to extend the settlement briefly" to give Congress "one last chance," before the case returned to the "multiple years of litigation" that would "be facing the parties on each side with * * * uncertain results." JA ___ (10/15/10 Tr. 6). The parties accordingly agreed to extend the settlement's Legislative Enactment Deadline to January 7, 2011. JA ___ (10/15/10 Tr. 7).

During the conference, Judge Hogan also expressed his "hope that the Congress will * * * effectuate the settlement," because he believed "a negotiated settlement" could "compensate [plaintiffs] for the losses" they claimed to have incurred and to enable Interior "to carry out its statutory duties" in the future. JA ___ (10/15/10 Tr. 5, 8). Judge Hogan concluded by observing that "[t]he Executive and the Judicial

Branch have spent a phenomenal amount of effort[] on these matters, and it is time that the Legislature resolve them as soon as possible," so that "[t]he efforts should not go in vain." JA ___ (10/15/10 Tr. 8-9).

2. The cited status conference in no way compelled Judge Hogan's disqualification. Johns invokes 28 U.S.C. § 455(a), which mandates that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." "In assessing section 455(a) motions, this circuit applies an 'objective' standard: Recusal is required when 'a reasonable and informed observer would question the judge's impartiality.'" *Loving Spirit Found.*, 392 F.3d at 493 (quoting *United States* v. *Microsoft Corp.*, 253 F.3d 34, 114 (D.C. Cir. 2001) (en banc)). Out-of-court statements concerning pending cases may sometimes satisfy this standard, such as when judges make "crude" comments in public about ongoing matters, or "secretly share their thoughts about the merits of pending cases with the press." *Microsoft Corp.*, 253 F.3d at 115. But "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge," because such remarks are generally based on "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior

proceedings," and thus entirely legitimate as part of the judicial function. *Liteky* v. *United States*, 510 U.S. 540, 555 (1994).

Judge Hogan's comments here reflect an ongoing settlement process and thus were made as part of "routine trial administration efforts" that "occur[] in the course of judicial proceedings." *Liteky*, 510 U.S. at 556. Active engagement in "facilitating settlement" is a staple of modern judicial policy. See, *e.g.*, Fed. R. Civ. P. 16(a)(5); Fed. R. Civ. P. 16(c)(1) ("If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement."); 28 U.S.C. § 473(a)(3)(A), (b)(5). Indeed, "it is quite apparent that intensive involvement in settlement is now by no means uncommon among federal district judges." *Wagshal* v. *Foster*, 28 F.3d 1249, 1253 (D.C. Cir. 1994). This Court itself intimated in 2006 that settlement of this case would be desirable. See *Cobell*, 455 F.3d at 335-36 (admonishing the parties to "work with the new judge to resolve this case expeditiously and fairly").

Promoting settlement often requires a district judge to signal his or her sense of the merits and likely direction of a pending case, and thus what a reasonable settlement agreement might contain. Because such observations are made in service of a proper judicial function, courts have uniformly rejected recusal requests based on

them. In *Bell* v. *Johnson*, 404 F.3d 997 (6th Cir. 2005), for example, the Sixth Circuit found no basis for recusal when, in an effort "to facilitate a settlement potentially advantageous to both parties" after ordering a new trial, a district judge revealed to the parties (1) the minimum damages that he believed a jury should award the plaintiff on retrial, (2) a note found in the jury room after the first trial listing possible verdicts, and (3) his own "inclin[ation] to award attorney fees." *Id*. at 1005-06; see also, *e.g.*, *Franks* v. *Nimmo*, 796 F.2d 1230, 1235 (10th Cir. 1986) ("attempts to encourage a settlement" gave rise to no appearance of bias); *Johnson* v. *Trueblood*, 629 F.2d 287, 291-92 (3d Cir. 1980) (recusal not required when district judge's "remarks at the settlement conference were based on his perception of the case and were an attempt to have the parties reach an agreeable settlement").

Here, in an effort to secure the parties' agreement to extend the expiration date of their contingent settlement agreement, Judge Hogan did no more than express his continued optimism that this long-running litigation might finally be resolved via a negotiated outcome, and his hope that Congress would enact the legislation that was a prerequisite to his ultimate determination whether to approve the settlement. To the extent Judge Hogan spoke favorably about the agreement prior to the fairness hearing, he did so only in his judicial capacity regarding an important procedural step and with

an eye towards facilitating a final disposition. Especially taking into account the entire context of this case, no reasonable observer could conclude, based on the cited remarks, that Judge Hogan would not conduct himself impartially when later tasked with considering concerns raised by objectors and assessing the overall fairness of the parties' agreement.[5]

C. Good Bear's Fairness Objections Misapprehend The Nature And Terms Of The Settlement.

Good Bear urges that the settlement is unfair, but her constricted argument reflects a misunderstanding of the nature and terms of the parties' agreement.

1. Good Bear asserts that this Court has "already agreed" that this settlement is unfair to the Historical Accounting Class. Br. 18. She relies on this Court's 2009 decision vacating the district court's holding that an historical accounting is "impossible." See *Cobell*, 573 F.3d at 809. In explaining why the district court had erred in awarding $455 million to the class as "restitution" with respect to its historical accounting claims, this Court stated, among other things, that such a restitutionary

[5] Contrary to Johns's suggestion, Judge Hogan did not say "'The merits are very clear'" in reference to the fairness of the settlement. Br. 16. He made that comment to explain his view of the underlying dispute between the parties. See 10/15/10 Tr. 5.

award would be "unfair" as a satisfaction of the historical accounting obligation. See *id*. at 813.

The fairness question here is different. For present purposes, the question is whether the parties' agreed-upon *settlement*, authorized and ratified by Congress, is fair. That question could not have been and was not before this Court in its 2009 ruling, which was issued prior to the existence of any settlement of the case.

2. Moreover, unlike the "restitution" ordered by the district court in 2008, the Historical Accounting Class settlement payments negotiated by the parties are not meant to compensate for any alleged account shortfalls, and thus need not be divided according to "who is owed what." *Cobell*, 573 F.3d at 813. In focusing on the settlement's payment of $1,000 to each member of the Historical Accounting Class, Good Bear's position misapprehends the nature and function of those payments. The settlement's per capita payment of $1,000 to each member of the Historical Accounting Class is consideration for the release of historical accounting claims, pursuant to a Congressionally authorized settlement. It is not a monetary award that plaintiffs could otherwise seek. It is not compensation for any individualized harm, nor does it resolve any claims of alleged trust mismanagement; the separate and additional payments to the Trust Administration Class serve those purposes. Rather,

the $1,000 settlement payment is in lieu of preparation and distribution to each HAC class member of an historical statement of account by Interior.[6]

Good Bear mistakenly suggests that, because plaintiffs may eventually have obtained some kind of accounting if the litigation had continued, it is unfair to settle that claim for a monetary payment. "The essence of settlement is compromise." *EEOC* v. *Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985); see *Berardinelli* v. *Gen. Am. Life Ins. Co.*, 357 F.3d 800, 805 (8th Cir. 2004). Even with respect to common law trusts, beneficiaries may release trustees from a duty to account. See 4 Pomeroy's Equity Jurisprudence § 1063 (5th ed. 1941). As a matter of fairness, there is nothing wrong with exchanging the claimed right to an historical accounting for a uniform payment plus the option of receiving compensatory damages as part of the Trust Administration Class — especially after 15 years of litigation revealed the equitable and jurisdictional limits on the capacity of the courts to direct an accounting.

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[6] As the district court reasoned, "you have to be able to settle" the case, "and the only way to settle is through money if you don't get [an] injunction." JA ___ (Tr. 229). And in response to objections such as Good Bear's that "awards should be individualized," the court explained that this argument incorrectly "conflate[s] the historical accounting class with the trust administration class." JA ___ (Tr. 231-32). The $1,000 payments to members of the Historical Accounting Class are "not damages" but are simply "consideration[]" paid by the government "for being released" from its unspecified historical accounting obligation. JA ___ (Tr. 231).

Wal-Mart Stores, Inc. v. *Dukes*, 131 S. Ct. 2541 (2011), relied upon by Good Bear (Br. 19-20), is irrelevant to this analysis. The Supreme Court held in *Wal-Mart* that Rule 23(b)(2) "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages," at least where monetary relief is not incidental to injunctive or declaratory relief. *Id*. at 2557; see also *Eubanks* v. *Billington*, 110 F.3d 87, 95 (D.C. Cir. 1997). But the historical accounting claims in this case were not claims for money damages, much less claims for individualized money damages. To the extent Good Bear suggests that the Historical Accounting Class, as a mandatory class, cannot be *settled* for uniform cash payments, she provides no support for that proposition and we are aware of none. With respect to the HAC, plaintiffs obtained — in a settlement — entirely *non*-individual payments based on allegations of a unitary failure to act. A per capita payment of $1,000 to each member of the Historical Accounting Class embodies a wholly reasonable and permissible means here of resolving what had become, after years of litigation in this case, an essentially intractable problem.[7]

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[7] Thus, as the district court explained, JA ___ (Tr. 229), the Historical Accounting Class was properly certified under Rule 23(b)(1)(A) because, with respect to an accounting, Interior "must treat all alike as a matter of practical necessity." *Amchem*, 521 U.S. at 614 (internal quotation marks omitted); see Adv. Comm. Notes on Fed. R. Civ. P. 23 (Rule 23(b)(1)(A) may properly be invoked "to obviate the actual or (continued...)

3. Good Bear complains that the $1,000 HAC payments reflect inadequate compensation for individuals with significant IIM account activity, Br. 17, but she overlooks that every member of the Historical Accounting Class is also a member of the Trust Administration Class, a class that, significantly, Good Bear elected to opt out of. Under the settlement, every TAC member who has not opted out will receive an additional baseline amount of approximately $850, over and above the $1,000 HAC payment. See JA __ (Herman Decl. ¶¶ 38-39). This individualized amount will then be adjusted upwards even further, *pro rata*, based on the highest ten years of receipts in a class member's IIM account(s) from 1985 to 2009, and will likely reach tens or hundreds of thousands of dollars for the most active account holders, and perhaps over $1 million for some. Thus, as appellants themselves put it in their brief, the TAC

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[7](...continued)
virtual dilemma" of varying adjudications). The same is true with respect to uniform monetary payments to release the duty to account; either Interior had to adopt uniform accounting standards and reconcile decades of inter-related transactions, or it had to pay all potential claimants for a release. Likewise, as the district court also noted, the HAC is properly certified under Rule 23(b)(2), because the declaration of an accounting duty and an order that Interior conduct an accounting would apply to the class as a whole. Uniform payments to discharge that obligation in a compromise would be incidental to the requested declaratory and injunctive relief and thus permissible under Rule 23(b)(2) as well. The presumption of cohesion and unity that follows from a unitary failure to act would apply equally to a unitary settlement payment in lieu of that act. Because "the assumption of cohesiveness underlying certification of a (b)(2) class" applies to uniform payments, no opt-out would be necessary. See *Thomas*, 139 F.3d at 234-36 (internal quotation marks omitted).

compensation "formula [is] designed to pay the most to those who have the highest dollar activity in their accounts, and the least to those who have had the least amount of dollar income into their accounts." Br. 10. Had Good Bear not chosen to opt out of the TAC, she presumably would have received precisely what she suggests she should have received: a substantial payment, proportionate to the amount of account activity she had. Br. 17.

Good Bear was certainly within her rights to eschew the TAC settlement, even though that settlement is based on an eminently sensible formula. As a witness explained to the court, the TAC settlement formula recognizes timing differences and smooths variances, by counting each class member's highest ten years of account revenues. See JA ___ (Herman Decl. ¶¶ 29-39). Moreover, as the district court previously recognized after taking substantial evidence, IIM "throughput" is a suitable proxy for estimating possible error. *Cobell*, 569 F. Supp. 2d at 252. And as to the amount of the TAC settlement, it offers fair and sizeable payments on potential trust administration claims to hundreds of thousands of individual Indians, without requiring any of them to incur the risks and expense of prosecuting those claims. Those hurdles would likely be considerable; beyond the question whether any significant shortfalls exist, see *Cobell*, 532 F. Supp. 2d at 60; JA ___, the statute of

limitations and the practical concerns of litigation costs pose a substantial risk that little, if any, likelihood of recovery would exist for many mismanagement claims. But having chosen to go it alone in pursuing any damages action, notwithstanding the considerable benefits of the TAC settlement, Good Bear should not be heard to complain that she should have received more from the settlement to reflect her own alleged harm.

In the end, the settlement in this case dedicates an unprecedented sum — about $1.5 billion — to pay for claims whose prospects are, at best, uncertain. Congress has provided the necessary funding, the district court after due deliberation has approved the parties' agreement, and only a tiny minority of the class has elected to opt out. The class fairness inquiry ultimately reflects "an amalgam of delicate balancing, gross approximations and rough justice," *Rodriguez* v. *West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009), and, as this Court has stated in another context, "[w]e must not allow the theoretically perfect to render impossible the achievable good." *Cobell*, 573 F.3d at 815. Good Bear's limited fairness objection to the $1,000 HAC payment is inapposite on its own terms, and also overlooks the broader contours of the overall settlement.[8]

[8] Good Bear also states that "[s]he does not think it is fair that the representative (continued...)

4. We briefly address Good Bear's reference to *Two Shields* v. *United States*, Fed. Cl. No. 11-531L, a putative class action in which the government has filed a motion to dismiss. See Br. 18-19. The plaintiffs there, as in the TAC in this case, allege breached fiduciary duties. The basis for the government's dismissal motion is not, as Good Bear represents, that the *Two Shields* plaintiffs are "precluded from pursuing their own claims," but rather that a claim in the Court of Federal Claims is jurisdictionally barred when it is "for or in respect to" a claim that the plaintiff "has pending in any other court." 28 U.S.C. § 1500; see U.S. *Two Shields* Mot. to Dismiss,

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[8](...continued)
plaintiffs should receive 150 to 2,000 times as much as she will receive from this settlement." Br. 17. For the reasons explained above, this comparison is flawed because Good Bear may have been entitled to a substantially larger payout from the settlement had she not opted out of the TAC. Insofar as she means, albeit implicitly, to call into question the district court's incentive awards to the named plaintiffs, any such contention would be baseless. The district court's determination to award $2.5 million in incentive payments was within the court's discretion, although it reflects a higher figure than what the government thought appropriate. "In deciding whether such an award is warranted, relevant factors include 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." *Cook* v. *Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998). The district court noted here that Elouise Cobell had been "intimately involved" in the case at all stages and had "pa[id] hundreds of thousands of dollars out of her own pocket," and that her co-plaintiffs had contributed substantially as well. JA ____ (Tr. 239-43). The incentive awards, especially considered in their cumulative context, do not detract from the settlement's fairness. See, *e.g.*, *Allapattah Services, Inc.* v. *Exxon Corp.*, 454 F. Supp. 2d 1185, 1218-22 (S.D. Fla. 2006).

Doc. 7-1, at 8-13 (citing *United States* v. *Tohono O'Odham Nation*, 131 S. Ct. 1723 (2011)). Because the *Two Shields* plaintiffs are members of the TAC in *Cobell*, a case is currently "pending in" this Court, and because their claims in the CFC are "for or in respect to" the same claims, the government has argued that Section 1500 bars the CFC action at this time.

To be sure, the *Two Shields* plaintiffs may ultimately be precluded from bringing their claims in the CFC by the *Cobell* settlement upon final approval. But if that is so, it will be because they declined to opt out of the TAC, despite a full and meaningful opportunity to do so. Good Bear, by contrast, stands in a different position, because she has opted out of the TAC, thereby preserving her right to bring her own CFC damages action for whatever mismanagement allegations, if any, that she might see fit to pursue. As shown above, that she could elect to do so only underscores the fairness of this settlement.

D. Congress Exempted Certification Of The Trust Administration Class From The Requirements Of Rule 23.

1. Finally, appellant Johns maintains that "[t]he Trust Administration Class cannot reasonably be said to meet the * * * Rule 23(a) requirements" of commonality

and typicality. Br. 20.[9] But the Claims Resolution Act provides that, "[n]otwithstanding the requirements of the Federal Rules of Civil Procedure," the district court "may certify the Trust Administration Class." CRA § 101(d)(2)(A). Congress wields "ultimate authority over the Federal Rules of Civil Procedure; it can create exceptions to an individual rule as it sees fit – either by directly amending the rule or by enacting a separate statute overriding it in certain instances." *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1438 (2010). Johns's objection based on Rule 23 is therefore misplaced.

2. Instead, the only limitations on certification of the TAC are those imposed by due process. Johns makes no argument that the TAC violates due process. We nevertheless note, for the sake of completeness, that due process was amply satisfied.

Due process is a "flexible concept." *Walters* v. *Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 320 (1985). In the context of a class action for individualized damages, due process generally requires that class members receive notice, an opportunity to be heard, a right to opt out, and adequate representation. See

[9] Appellants' brief does not specify which appellant makes this argument. Because Good Bear and Colombe opted out of the TAC, however, they lack standing to challenge the government's settlement with that class. See *In re Vitamins Antitrust Class Actions*, 215 F.3d 26, 31 (D.C. Cir. 2000); *Mayfield*, 985 F.2d at 1092-93. The argument must therefore be Johns's.

Phillips Petroleum Co. v. *Shutts*, 472 U.S. 797, 811-12 (1985); *In re Veneman*, 309 F.3d at 795 (discussing *Shutts*). These elements are malleable and, to some extent, overlapping. See, *e.g.*, *Williams* v. *Burlington N., Inc.*, 832 F.2d 100, 104 (7th Cir. 1987).

As to notice, the district court observed that notice in this case was "extensive and extraordinary." JA __ (Tr. 230). Plaintiffs and the government, with the aid of a retained expert and numerous other entities, undertook an elaborate and comprehensive effort to ensure that class members received notice of the action and of the parties' agreement and its terms. See *supra* at 16. Likewise, class members had ample opportunity to participate in the district court proceedings, both by submitting written objections and being heard at the fairness hearing. See JA ___ (Tr. 33-137). Regarding the right to opt-out, as we have stressed, the settlement provided a robust opt-out right that allows those electing that option to pursue whatever trust administration claims they see fit, subject to applicable law. See JA __ (SA ¶ I.7). And, by all measures, the class was adequately represented. See *Twelve John Does* v. *Dist. of Columbia*, 117 F.3d 571, 575 (D.C. Cir. 1997) (factors include the quality of class counsel, the degree to which the interests of class representatives differ from those of other class members, and the overall context of the litigation.). This litigation

has at all times since its inception been vigorously pursued, and the representatives obtained for the class substantial and guaranteed recovery, while preserving an unfettered right to opt out. As the district court noted, "I don't know how anyone can say that there was not adequate representation." JA __ (Tr. 226).

At bottom, due process presents a case-specific inquiry. If the district court had disapproved the Trust Administration Class, the underlying litigation may well have continued for years, and it is entirely possible that plaintiffs would ultimately have been awarded little or no relief. In other words, many class members may have gone "without any effective redress." *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 339 (1980). Due process does not inflexibly compel that result, and the district court properly concluded that certification of the TAC, and the terms of the settlement in general, amply passed any constitutional muster. See, *e.g.*, JA __ (Tr. 230).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is in compliance with Rule 32(a)(7) of the Federal Rules of Appellate Procedure. The brief contains 12,731 words, and was prepared in 14-point Times New Roman font using Corel WordPerfect 12.0.

s/ Brian P. Goldman
BRIAN P. GOLDMAN

CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2012, I filed and served the foregoing Brief For The Defendants-Appellees with the Clerk of the Court by causing a copy to be electronically filed via the appellate CM/ECF system. Participants are registered CM/ECF users and will be served via the CM/ECF system.

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