[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.

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

The Court should deny Objector-Appellant Kimberly Craven's motion for judicial notice. Craven asks the Court to take judicial notice of pleadings filed in *Two Shields v. United States*, No. 11-531-L (Fed. Cl.), to show that "the *Cobell* settlement eliminates the claims of the putative class member Indians in *Two Shields* who received $80/acre or less for land leases worth $10,000/acre." (Mot. 2.) A court may take judicial notice of pleadings in a separate, pending lawsuit only to show that those pleadings *exist*, but not—as Craven requests here—for the *truth* of the allegations contained within them.

Moreover, Craven misrepresents the government's motion to dismiss in *Two Shields*. Under 28 U.S.C. § 1500, the Court of Federal Claims lacks subject matter jurisdiction if, at the time the action is filed, another action involving the same operative facts is pending in another court. *United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723, 1731 (2011). The government's motion to dismiss in *Two Shields* does not argue that the *Cobell* settlement bars the *Two Shields* claims, but instead that the Court of Federal Claims lacks jurisdiction to hear those claims while *Cobell* is pending.

Finally, if the *Two Shields* plaintiffs believed the *Cobell* settlement was not in their interests, they could have opted out of the settlement and pursued their claims separately. They did not do so. (Dkt. #3850, #3850-1.) Thus, even if the allegations in the *Two Shields* complaint were the proper subject of judicial notice, those allegations do not support Craven's arguments in this appeal. Accordingly, Craven's motion should be denied.

ARGUMENT

I. The Court should not take judicial notice of the factual allegations and arguments in the *Two Shields* pleadings.

The *Two Shields* pleadings attached to Craven's motion are not proper subjects for judicial notice. "A court may take judicial notice of a document filed in another court *not for the truth of the matters asserted* in the other litigation, but rather to establish the fact of such litigation and related filings." *Liberty Mut. Ins.*

Co. v. Rotches Pork Packers, Inc., 969 F.2d 1384, 1388-89 (2d Cir. 1992) (emphasis added). Thus, while this Court has taken judicial notice of pleadings in other pending cases, it "takes judicial notice of the existence of the documents, not the accuracy of any legal or factual arguments made therein." *Am. Mgmt. Sys., Inc. v. United States*, No. 01-7197, 2002 WL 31778773, at *1 (D.C. Cir. Dec. 4, 2002); *see also* 21B Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5106.4 (2d ed. 2005) ("It seems clear that a court cannot notice pleadings or testimony as true simply because these statements are filed with the court.").

Craven cannot use judicial notice as a means to establish the facts alleged in the *Two Shields* complaint. Craven asks the Court to take judicial notice of the pleadings because (she asserts) they demonstrate that "the *Cobell* settlement eliminates the claims of the putative class member Indians in *Two Shields* who received $80/acre or less for land leases worth $10,000/acre." (Mot. 2.) Craven contends that these factual allegations demonstrate inequities in the *Cobell* settlement. (Mot. 3.) But that argument necessarily requires the Court to assume the truth of the allegations in the *Two Shields* pleadings, not merely the fact that the lawsuit exists.

Indeed, Craven's reliance on the factual allegations in the *Two Shields* complaint, at this early stage in that litigation, underscores why judicial notice is

improper here. For example, the claims in *Two Shields* may be barred by legal defenses such as the statute of limitation or the jurisdictional limits of the Court of Federal Claims, *see infra* at 4-5. Or those factual allegations could simply be false. Thus, the factual allegations in the *Two Shields* complaint are not a proper subject of judicial notice and Craven's motion should be denied.

II. Craven misrepresents the grounds for the government's motion to dismiss in *Two Shields*.

Craven also argues that "the government filed a motion to dismiss the $400+ million [*Two Shields*] lawsuit on the grounds that these claims were waived by the Trust Administration class in the *Cobell* settlement in exchange for $500/person." (Mot. 2.) This is not true. The government moved to dismiss *Two Shields* because the Court of Federal Claims "lacks subject-matter jurisdiction to entertain a suit if the plaintiffs have a suit in another court based upon substantially the same operative facts." (Mot. Ex. B at 1.)

The Court of Federal Claims is a court of limited jurisdiction and, under 28 U.S.C. § 1500, it lacks jurisdiction if there is a case pending in another court that is "based on substantially the same operative facts, regardless of the relief sought in each suit." *Tohono O'Odham Nation*, 131 S. Ct. at 1731. The government moved to dismiss based on the jurisdictional limits in § 1500, not based on the estoppel or res judicata effect of the *Cobell* settlement. (Mot. Ex. B at 1, 8-13.) Because Craven's motion turns on "[t]he fact that the government has moved to dismiss a

lawsuit of this type as claim-barred" (Mot. 3), and that characterization of the government's motion is wrong, Craven's motion should be denied.

III. The plaintiffs in *Two Shields* are class members who had the opportunity to opt out of the *Cobell* settlement.

Finally, Craven overlooks the fact that the plaintiffs in *Two Shields* are members of the *Cobell* Trust Administration Class who had the opportunity to opt out of the *Cobell* settlement and pursue their claims independently—but chose not to. It is well-settled that class members who opt out of a class are not barred by any res judicata effects of a class settlement. *See, e.g., Mayfield v. Barr*, 985 F.2d 1090, 1092 (D.C. Cir. 1993).

Here, Plaintiffs undertook the most extensive class settlement notice procedures ever conducted. Plaintiffs sent direct mail notice to the known addresses of all class members; advertised the settlement extensively in local, regional, and national media including television, radio, newspapers, and magazines; and contacted businesses, non-profits, educational institutions, and other groups serving Indians to provide posters, flyers, DVDs, and other materials containing notice of the Settlement, in English and multiple Indian languages. (Dkt. #3660, at 19-23.) In addition, Ms. Cobell and class counsel for months traveled thousands of miles through Indian Country to explain the settlement to thousands of class members. (*Id*.) The settlement garnered significant media

coverage and public statements by high-ranking government officials, including the President. (*Id*.)

The settlement also included a complete, unfettered opt-out right. That opt-out right was communicated to class members in the notice documents, under the heading "What if I don't want to be in the Settlement?" (Dkt. #3660-19, Class Notice at 12-13.) It provided detailed instructions concerning class members' opt-out rights and the procedures for electing to opt-out. (*Id*.) Similar opt-out information was contained in the posters, print advertisements, and other media used to notify class members of the settlement. (*Id*.)

As a result of this unprecedented notice campaign, the *Two Shields* plaintiffs were aware of the terms of the settlement and their right to opt out or object to the terms of the Trust Administration Class. They also knew that the *Cobell* settlement resolved any trust mismanagement claims against the government that arose before September 30, 2009. (Dkt. #3660-19, Class Notice at 12-13.) But the *Two Shields* plaintiffs neither opted out nor objected to the terms of the settlement.

Some class members chose to opt out because they believed they were entitled to more than the *Cobell* settlement provided. For example, a number of individuals from the Quapaw Tribe of Oklahoma opted out of the *Cobell* settlement and filed a complaint in the Court of Federal Claims. *See* Complaint, *Goodeagle v. United States*, No. 11-cv-00009 (Fed. Cl. Jan. 5, 2011).

It is telling that Craven chose not to ask the Court to take judicial notice of lawsuits from class members who opted out. Those lawsuits undermine Craven's claim that the settlement is unfair to class members with high-value trust mismanagement claims. In any event, the fundamental flaw in Craven's motion for judicial notice is that it asks the Court to accept as true the factual allegations in the *Two Shield* lawsuit. Those facts are not the proper subject of judicial notice.

CONCLUSION

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

Respectfully submitted,

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

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

Keith M. Harper
KILPATRICK TOWNSEND & STOCKTON LLP

607 14th Street, N.W.
Washington, D.C. 20005
Telephone: (202) 508-5844

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

DATED: December 14, 2011

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2011, I filed a copy of the foregoing PLAINTIFFS' OPPOSITION TO OBJECTOR-APPELLANT'S MOTION FOR JUDICIAL NOTICE with the clerk of court using the CM/ECF system and served a copy by first class mail on the following:

Theodore H. Frank
CENTER FOR CLASS ACTION FAIRNESS
1718 M Street NW, No. 236
Washington, D.C. 20036

Thomas M. Bondy
Michael S. Raab
UNITED STATES DEPARTMENT OF JUSTICE
Appellate Staff, Civil Division
950 Pennsylvania Ave., N.W.
Room 7535
Washington, D.C. 20530

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

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