IN THE UNITED STATES COURT OF FEDERAL CLAIMS

THE WESTERN SHOSHONE IDENTIFIABLE GROUP, represented by THE YOMBA SHOSHONE TRIBE, a federally recognized Indian Tribe, et al.,	
Plaintiffs,	No. 06-896L
v.	Judge Marian Blank Horn
THE UNITED STATES OF AMERICA,	Filed Electronically February 8, 2021
Defendant.	

UNITED STATES' POST-TRIAL REPLY BRIEF

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INTRODUCTION

In their Post-Trial Reply Brief (ECF No. 208), Plaintiffs wrongly accuse the United States' expert Dr. Starks of providing "false" testimony to the Court. Plaintiffs also speculate that counsel for the United States has "confirmed that Dr. Starks has erred and that her testimony was wrong," and accuse United States' counsel of a lack of candor. These unfounded accusations are contradicted by the trial record, and by the United States' Post-Trial Brief, which continues to assert all of Dr. Starks's well-supported critiques of Mr. Nunes's damages opinions – none of which are "false" or "phony" as Plaintiffs contend. Rather, Plaintiffs appear to misunderstand Dr. Starks's critique regarding the frequency of portfolio reinvestment in Mr. Nunes's damages model. Dr. Starks argues and the trial record reflects that Mr. Nunes's Barclays-index based model reinvests income *monthly* and compounds that reinvestment income *monthly* – not quarterly, as Mr. Nunes stated in his expert report and at trial. The $17.2 million delta (or $13.3 million delta in the 7.86-year weighted average maturity scenario) between the calculations in Mr. Nunes's expert report — based on data that reflect the *monthly reinvestment* and associated compounding inherent in the Barclays indexes — and what those calculations would have shown had he used data reflecting a *quarterly reinvestment* approach, is accurately presented in DX-2124 (Starks Demonstratives 56-57) at WSIG-TRIAL-10756-57 and cited in the United States' Opening Post-Trial Brief (ECF No. 207) on pages 68 and 69. Dr. Starks did not make a mathematical error or provide incorrect testimony to the Court. Consequently, there is nothing for United States' counsel to correct.

Beyond these unfortunate accusations, Plaintiffs offer nothing new in defense of Mr. Nunes's damages calculations, which are not realistic. Mr. Nunes's damages model does not fairly measure income that could have been earned by investing in a manner consistent with sound principles of finance and real-world constraints, including the Interior Department's statutory obligations, policies and practices. Plaintiffs continue to repeat that Mr. Nunes's model is based on "objective, verifiable data" and "market averages" but ignore that Mr. Nunes's synthetic indices reflect subjective decisionmaking in almost every way, and mimic an inappropriate and risky investment strategy that the Interior Department simply could not execute in the real world. Plaintiffs' mantra that its proffered "benchmarks" do not reflect specific investment strategies defies reality, and Plaintiffs do not explain how the Interior Department could have possibly achieved the investment gains measured by Barclay's indices without undertaking the kinds of portfolio management that Barclay's uses to generate its results.

Plaintiffs also wrongly argue that Dr. Starks's opinions are "at odds with the evidence." In fact, Dr. Starks's one-to-ten-year ladder portfolio conforms much more closely to the Interior Department's record of investment during the 1992-1997 prudent period, adheres to the Court's liability opinion, and presents a reasonable and prudent investment portfolio that Interior actually could have executed consistent with its policies and principles of risk and return.

Ultimately, Plaintiffs fail to address the most significant flaws in their damages model: that it was constructed with the benefit of hindsight, adopts an investment time horizon inconsistent with Interior's prudent period investment record, defies Interior's policies and practices, and completely ignores the risk-return tradeoff to "reach for yield." Plaintiffs are also wrong on the law. The *Warm Springs* decision requires a "plausible" and reasonable estimate of damages and does not permit Plaintiffs to cherry pick a high-performing portfolio using hindsight. The Court should reject Plaintiffs' implausible model and accept Dr. Starks's reasonable estimate of damages.

The Court should also reject Plaintiffs' claims for prejudgment interest, which are barred by controlling law. The *Osage* case Plaintiffs cite, which deals with a fact pattern not present in this case, does not authorize the payment of damages through the time of trial for the alleged underinvestment of the Docket 326-K Fund, whose proceeds were required by law to be paid — and actually were paid — to the Fund's beneficiaries many years ago.

For the reasons set forth in our opening Post-Trial Brief, and for the reasons set forth further below, the Court should award damages of no more than **$73,816,515** for the breaches of trust associated with the Interior Department's management of the Docket 326-K Fund, and no more than **$987,920** for the breaches of trust associated with the Interior Department's management of the Docket 326-A-1 and Docket 326-A-3 Funds.

I. Plaintiffs Mischaracterize and Misunderstand Dr. Starks's Critique Regarding Quarterly Reinvestment and Wrongly Accuse the United States of Failing to Correct Alleged Errors

Plaintiffs' unfounded accusations appear to arise from Plaintiffs' own failure to understand the contradictions in Mr. Nunes's testimony, as explained by Dr. Starks. Contrary to Plaintiffs' assertion, Dr. Starks did not provide "inaccurate" or "false" testimony to the Court about Mr. Nunes's damages model. Because Dr. Starks's critique is accurate, there is no "error" for the United States to "acknowledge," and no merit in Plaintiffs' contention that the United States has breached a duty of candor to the Court.

A. Dr. Starks Correctly Criticizes Mr. Nunes for Claiming That His Damages Model Reinvests Income Quarterly Instead of Monthly

Plaintiffs' expert Mr. Nunes repeatedly insisted that his damages model reinvests and compounds on a *quarterly* basis – that is, that income generated by the investment activity in the model is accumulated over three-month periods and is not reinvested until the end of each three-month period. His original expert report states:

> To calculate the investment income that WSIG would have received if the Government had prudently invested the funds…the IM [Investment Model] applies the periodic returns of the investment portfolio proxies defined above to the amount of WSIG funds the Government was entrusted to invest, **reinvesting the returns quarterly** to align with the quarterly reset of the indices. . . .

See JX-420 (Expert Report of Rocky Hill Advisors, Inc., January 21, 2015) at WSIG-TRIAL-06052 (emphasis added). *See also id*. at WSIG-TRIAL-06045 ("[t]he mathematical construction of the IM is as follows: […] **Investment earnings are reinvested quarterly**.") (emphasis added). In his damages phase expert report, Mr. Nunes explains that his model was in all relevant respects unchanged,[1] and at the damages trial Mr. Nunes again insisted that his model only reinvests earnings on a *quarterly* — *not* a monthly — basis:

> Q. And my point is that — well, your model, the mechanics of your model operates just as the Barclays index does; namely, it invests and actively deploys cash earned on a month-by-month basis, not on a quarter-by-quarter basis.
>
> A. No.
>
> Q. I'm wrong about that?
>
> A. How our model does it?
>
> Q. Yeah.
>
> A. No. Our model re[]invests each quarter's earnings at the end of the quarter in the same cadence as the Barclays index quarterly return data point resets

Damages Trial Tr. 191:11-23 (Nunes Cross). *See also* Damages Trial Tr. 193:6-8 (Nunes Cross) ("Q. Okay. So your model re[]invests the cash earnings on a quarterly basis. A. Correct");

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[1] *See* JX-434 (RHA Damages Report) at WSIG-TRIAL-07586 ("Our revisions to our models (1) utilize the returns of the Government's extant investment portfolios for those periods for which the court found no breach of trust, and (2) utilize investment horizons and maturity structures consistent with the court's analysis for those periods in which the court did find a breach. Otherwise, the investment models themselves remain essentially the same.").

Damages Trial Tr. 194:20-25 (Nunes Cross) ("Q. So your model invests cash earnings on a quarterly basis? A. Re[]invests earnings quarterly, in sync with the -- Q. Okay. Not monthly? A. Not monthly.").

Mr. Nunes's expert reports and testimony raise the question Dr. Starks identified in her rebuttal report: because the Nunes damages model employs Barclays index data, does his model reflect the *monthly* compounding that the Barclays indexes incorporate into their returns? Mr. Nunes has repeatedly insisted that his model reinvests quarterly, not monthly. But Dr. Starks has demonstrated that Mr. Nunes's opinion on this point is, at a minimum, confused. The source of that confusion is the fact that Mr. Nunes's model incorporates the returns calculated by the Barclays U.S. Treasury indexes, and *the Barclays indexes reinvest earnings monthly*. Damages Trial Tr. 387:13-389:14 (Starks Direct) (though Plaintiffs' expert states repeatedly that the model reinvests income quarterly, the Barclays indexes actually reinvest monthly, as reported by Barclays themselves). *See also* JX-438 (Starks Rebuttal Report) at WSIG-TRIAL-08449 n. 15 ("Intra-month cash flows from interest and principal payments contribute to monthly index returns…[a]t each rebalancing, cash is effectively reinvested into the Returns Universe for the following month so that index results over two or more months reflect monthly compounding…") (Quoting "US Treasury Index" Factsheet, Bloomberg Barclays Indices, February 8, 2017, at 2, available at https://data.bloomberglp.com/indices/sites /2/2016/08/2017-02-08-Factsheet-US-Treasury.pdf). (emphasis omitted).

At trial, Mr. Nunes had to concede that the Barclays returns, which are incorporated into his damages model, reflect *monthly* compounding. Damages Trial Tr. 124:7-10 (Nunes Direct); 188:23-189:21; 191:24--192:6 (Nunes Cross). *See id.* at 190:12-23 (Nunes Cross):

> Q. . . . And as I understand it, [Barclays reinvests] those dollars at the end of each month. So money coming in in January is invested and deployed, actively deployed, at the end of January and starting in February.
>
> A. Yes. What it means is for February you're deploying more cash, but it's across the same index allocation once the index resets.
>
> Q. Fair enough. But that cash is used, in effect, to buy more Treasury bills, treasuries, so that cash is now earning its own coupon payment.
>
> A. Correct.

Because the Barclays indexes reinvest earnings on a monthly basis, and because Mr. Nunes takes Barclays index returns as his starting point for modeling damages, Mr. Nunes's damages calculations incorporate monthly reinvestment and compounding, not quarterly reinvestment and compounding. When Mr. Nunes repeatedly insists (in his reports and at trial) that his model does not reflect monthly reinvestment and compounding, he is, as a result, wrong. That is the point that Professor Starks made in her Rebuttal Report, JX-438 at WSIG-TRIAL 8449, and at trial. Damages Trial Tr. 388:8-19 (Starks Direct) (discussing JX-420 and Starks Demonstrative 49). Beyond this, Professor Starks showed that the difference is substantial. If, as Mr. Nunes insisted (in his reports and at trial), his damages model in fact reflected only quarterly reinvestment and compounding, the calculations in his expert report would be reduced by $17.2 million and $13.3 million.[2]

[2] JX-438 at WSIG-TRIAL-8472; DX2124 (Starks Demonstrative 56) at WSIG-TRIAL-10756; DX-2124 (Starks Demonstrative 57) at WSIG-TRIAL-10757. These numbers refer to Mr. Nunes's two damage calculations, the first using a 10-year average maturity, the second using a 7.86-year average maturity in his but-for portfolios. *Id*. Professor Starks's original calculations were based on Mr. Nunes's original damage calculations, before he corrected his admitted $50-million error. After correcting for the $50-million error, Professor Starks's calculated disparities between monthly and quarterly compounding are $15.5 million and $12 million. DX-2120 (Starks Surrebuttal Decl. and Exs.) at WSIG–TRIAL-10683. Plaintiffs (Pls.' Post-Trial Reply Br. at 3-4) are correct that in our opening brief the United States alluded to Professor Starks's original calculations, rather than those that adjusted for Mr. Nunes's $50-million error.

Importantly, Mr. Nunes agreed that Dr. Starks's calculations are correct. The calculations were summarized in Professor Starks's Rebuttal Report (JX-438 at WSIG-TRIAL-8472), with which Mr. Nunes raised no issue. *See* Damages Trial Tr. 154:16--155:4 (Nunes Cross) (discussing JX-438 at WSIG-TRIAL-8472):

> Q. . . . Now, first, do you recognize this document which is Exhibit 1 to Dr. Starks' original rebuttal report?
>
> A. Yes, I do.
>
> Q. And am I right that you have no quarrel with her arithmetic, which is to say, you don't disagree with the way in which she's calculated the impact of the – what she regards as mistakes? You may disagree that they're mistakes, but you don't disagree with the way she's calculated the impact of the mistakes?
>
> A. That's right. We don't disagree with her calculus.
>
> Q. And that's true for all of the different line items in this Exhibit 1 to JX438?
>
> A. Yes.

See also Damages Trial Tr. 156:13-20 (Nunes Cross).

Plaintiffs now argue that the monthly vs. quarterly *reinvestment* issue is "preposterous" or "phony" because Mr. Nunes understood all along that the Barclays index portfolios "*rebalance*" monthly. Pls.' Post-Trial Reply Br. at 4-5. But "*rebalancing*" is different from "*reinvesting*." The Barclays' indexes do indeed rebalance monthly — which means that the index portfolios change each month to maintain the rules-driven mix of bonds in the index. *See* Damages Trial Tr. 234:4-18 (Nunes Cross) (agreeing that the Barclays U.S. Treasury Index, which contains bonds reflecting all outstanding Treasury bond issuances, rebalances *each month*). But the indexes also *reinvest monthly* and "reflect monthly compounding." *See* DX-2124 (Starks Demonstrative 50) at WSIG-TRIAL-10750; Damages Trial at 388:20-389:10 (Starks Direct). It is the monthly *reinvestment* and monthly compounding feature of the Barclays indexes that Mr. Nunes overlooks or misunderstands in arguing that his model only reflects *quarterly* reinvestments. Because Mr. Nunes's model relied on the Barclays indexes, his model reinvests income *monthly*.

Plaintiffs' misunderstanding on this subject seems to stem from Mr. Nunes's mistaken impression that Dr. Starks has criticized the calculations underlying the conversion of Barclay's quarterly earnings rates into monthly or daily earnings rates. At trial, Mr. Nunes went to great lengths to try to demonstrate that his confusion between monthly and quarterly reinvestment and compounding did not result in any kind of "double-counting." *See* Damages Trial Tr. 124:19-22 (Nunes Direct) ("[W]e made sure that there was absolutely no double-counting in the way Barclays comprises its indexes for a month versus a quarter versus a year. . . "); *Id.* at 127:12-16 (Nunes Direct) ("So if there was double-counting . . . in the quarterly rate as opposed to the monthly rate, which is the easiest to understand, then we should end up with a different number, and we don't . . ."); *Id.* at 188:21 (Nunes Cross) ("There is no double-counting. . . "); *Id*. at 193:25-194:19 (Nunes Cross). But neither Dr. Starks nor Dr. Longstaff testified at trial that Plaintiffs' confusion between quarterly and monthly reinvestment resulted in "double counting" of the earnings reflected in the Barclays' indexes.[3] Indeed, when confronted with that mistaken idea, Dr. Starks corrected Plaintiffs' counsel's mischaracterization of her critique:

[3] The only time Dr. Starks used the term "double-counting" to describe her monthly versus quarterly reinvestment critique was at deposition, when she made the same point she articulated at trial. *See* Ex. 1, Starks May 22, 2020 Dep. Tr. at 6:3-6 (" . . . the quarterly earnings already had monthly reinvestment rates in them. So they were double counting. . . ."); 7:18-22 ("my understanding is that [Rocky Hill] assume[s] that the reinvestment is on a quarterly basis in Barclays. If that were true, what they did would have worked. But that's not true because Barclays reinvests on a monthly basis."). Dr. Starks's deposition testimony was not introduced at trial and is not part of the record in this case, but the United States attaches the relevant portion of her deposition transcript here for purposes of context and because her testimony appears to have been misunderstood or misconstrued by Plaintiffs.

> Q: And then for purposes of reporting, Barclays reports a monthly earnings rate, a quarterly earnings rate, and an annual earnings rate, correct?
>
> A: Yes, and I have no problems with the way Barclays has done that.
>
> Q: All right. So Barclays makes sure there's no double count. When they give you a quarterly rate, they have taken account of the fact that they're doing a monthly reinvestment in constructing that, right?
>
> A: Rocky Hill has said in their methodology that they are reinvesting quarterly, but they have not adjusted the Barclays for the monthly reinvestment which is counter to what they say their model is doing.
>
> Q: How do you know they did that?
>
> …
>
> A: They said that they did that. That's how they explained their model.
>
> …
>
> Q: You did look at the spreadsheets?
>
> A: I did.
>
> Q: Okay. And in the spreadsheets you got -- you got Rocky Hill's investment model that showed, month by month, how it was increasing the earnings in the portfolio, right?
>
> A: Yes.
>
> Q: Okay. **Don't those spreadsheets show that what you said is not correct?**
>
> A: **Absolutely not, Mr. Gordon**. As I keep -- as I tried to explain to you before, as I tried to explain yesterday, as I'm trying to explain now, **those quarterly earnings rates have monthly reinvestment embedded in them from Barclays**, **because Barclays reinvests monthly. Rocky Hill in their report said they're reinvesting quarterly. So they are -- so their -- what they're using in their spreadsheet is counter to what they're saying that they're doing.**

Damages Trial Tr. 550:23-551:11; 551:14-15; 551:18-552:10 (Starks Cross) (emphasis added).

Dr. Starks's testimony during cross-examination is completely consistent with the clear testimony Dr. Starks offered during her direct examination:

> Q. Explain to the Court what you mean by your statement that Rocky Hill has improperly – improperly stated the frequency of reinvestment in its model.
>
> A. So Rocky Hill has said that their reinvestment of earnings occurs quarterly; however, Barclays in the index reinvested monthly. The chart that Mr. Nunes showed earlier today, which — or yesterday, which – it must have been yesterday because I just heard it over the phone — but also **what was in his filing is not what my critique is**. **I'm not critiquing what Barclays does**. Barclays is very good at transforming a monthly interest

> rate to a quarterly interest rate to an annual interest rate. **My critique is that Rocky Hill said that they were reinvesting quarterly when, in fact, in their model, they are reinvesting monthly. So this difference between what they said they were doing and what they did in their spreadsheet is what I'm calling improper reinvestment frequency, because it doesn't align with what they said they were doing.**

Id. at 387:13-388:7 (Starks Direct) (emphasis added).

In summary, Dr. Starks's critique regarding the "frequency" of reinvestment in Mr. Nunes's model has been clear and consistent and remains correct. Because Mr. Nunes relies on Barclays' indexes to construct his model, and because the Barclay's indexes reinvest income on a *monthly* basis, Mr. Nunes's model reflects *monthly reinvestment* and the earnings and compounding associated with that monthly reinvestment activity. Had Mr. Nunes's model used a quarterly reinvestment approach — instead of Barclays' monthly reinvestment approach — his damages calculations would have been reduced by $15.5 million (in the 10-year scenario) and $12 million (in the 7.86 year scenario).

B. The United States Has At All Times Asserted Dr. Starks's Accurate Critique, Has Not "Withdrawn" That Critique, and Holds No Obligation to "Correct" Dr. Starks Testimony

Rather than addressing their expert's evident confusion and the shortcomings in his opinions, Plaintiffs blame the messenger and make unhelpful and unnecessary accusations regarding the truthfulness of the United States' submissions to the Court. Pls.'s Post-Trial Reply Br. at 2-7. This unfortunate approach is based upon the inaccurate premise that Dr. Starks's "reinvestment frequency" critique is wrong. *Id.* at 2-4. From there, Plaintiffs speculate that the United States has "evidently confirmed that Dr. Starks had erred," and accuses undersigned counsel of downplaying or "disguising" Dr. Starks's "reinvestment frequency" critique in the United States' Post-Trial Brief. *Id.* at 1, 4-5. Each element of this argument is incorrect.

As the foregoing discussion establishes, Dr. Starks's critique regarding reinvestment frequency is true. And Plaintiffs do not accuse Dr. Starks of misrepresenting any specific factual information or other evidence. Rather, Plaintiffs' entire argument that Dr. Starks testified "falsely" to the Court boils down to this: Plaintiffs fault Dr. Starks for arguing "emphatic[ally] that [Mr. Nunes's] model 'actually reinvests monthly.'" *Id.* at 3. But Dr. Starks proved this assertion at trial. And she quantified what the impact would be on Plaintiffs' damages calculations if Plaintiffs' model had truly reinvested income quarterly. Furthermore, Plaintiffs declined to interrogate Dr. Starks's quantification of the impact of her critique on Plaintiffs' damages: "We don't disagree with her calculus." Damages Trial Tr. at 154:25-155:1 (Nunes Cross).

Plaintiffs' suggestion that the United States "withdrew" Dr. Starks's "reinvestment frequency" critique or attempted to "disguise" it in our opening Post-Trial Brief is also wrong. Indeed, Plaintiffs contradict themselves on this point when they observe that the United States reproduced in its brief two exhibits (JX-438, Ex. 1; DX 2124) that show the quantification of Dr. Starks's critique. *See* Pls.' Post-Trial Reply Br. at 3 (citing U.S.' Opening Post-Trial Br. at 61, 69). The United States also referred to and discussed the critique on pages 66 and 67 where the United States cited Dr. Starks's testimony and Dr. Starks's Rebuttal Report where it discusses the monthly compounding feature of the Barclay's indexes that Mr. Nunes uses in his model. *See* U.S.' Opening Post-Trial Br. at 66-67 (citing Damages Trial Tr. at 387:13-389:14 (Starks Direct) and JX 438 at WSIG-TRIAL-08449 n.15).

Furthermore, Plaintiffs' confusion regarding monthly versus quarterly reinvestment is a relatively minor point given the magnitude of Mr. Nunes's other errors, each of which the United States discussed at greater length in our Opening Post-Trial Brief. *See* U.S.' Opening Post-Trial Br. at 58-65. Indeed, as shown in the summary below and on pages 68 and 69 of the United States' Opening Post-Trial Brief, each of the other modeling errors Dr. Starks quantified operate to inflate Plaintiffs' damages calculations by larger dollar increments:

CORRECTIONS TO REVISED RHA DAMAGES ANALYSIS
IN $ MILLIONS

	Revised RHA 10-Year Model			Revised RHA 7.86-Year Model		
326-K Fund	Damages	Difference	Percent	Damages	Difference	Percent
	[A]	[B]	[C]	[D]	[E]	[F]
[1] **Revised RHA Damages**	**$130,588,757**			**$111,463,006**		
Corrections for RHA Errors						
[2] Miscalculation of Returns in 1992-1997 Non-Liability Period	$130,588,757	$0	0.0%	$111,463,006	$0	0.0%
[3] Miscalculation of Returns in the Post-2006 Non-Liability Period	$130,588,757	$0	0.0%	$111,463,006	$0	0.0%
[4] Incorrect Conversion of Quarterly Index Returns to Daily Earnings	$115,037,053	($15,551,704)	(11.9%)	$99,448,006	($12,014,999)	(10.8%)
[5] Incorrect Use of Years to Maturity Instead of Years to Call	--	--	--	$97,552,527	($13,910,479)	(12.5%)
[6] Improper Use of Arbitrary Transition Periods	$97,517,533	($33,071,224)	(25.3%)	$84,158,009	($27,304,996)	(24.5%)
[7] RHA's Inclusion of Pre-Judgment Interest	$113,810,587	($16,778,170)	(12.8%)	$97,142,131	($14,320,875)	(12.8%)
[8] Interaction Effects		$7,451,458	5.7%		$11,549,380	10.4%
[9] **All Corrections Combined**	**$72,639,117**	**($57,949,640)**	**(44.4%)**	**$55,461,037**	**($56,001,969)**	**(50.2%)**
[10] **Starks Damages Report**	**$73,816,515**					

DX-2120 at WSIG-TRIAL-010683.

The United States did not focus as much attention on this deficiency in Plaintiffs' calculations because it was simply not as impactful as other errors Mr. Nunes made. Certainly, the circumstances here do not support Plaintiffs' misguided invocation of the Model Rules of Professional Conduct. Plaintiffs fail to point to a single fact or piece of evidence that Dr. Starks has allegedly "misled the Court about," Pls.'s Post-Trial Reply Br. at 7, and undersigned counsel knows of no evidence, "material" or otherwise, that Dr. Starks has offered or presented "falsely." The fact patterns in the cases Plaintiffs invoke — including situations in which lawyers failed to disclose the terms of a prior settlement that might be dispositive of their clients' claims, *Hanover*

Ins. Co. v. United States, 146 Fed. Cl. 447, 450 (2019), or failed to correct an expert's false statement about his academic credentials, *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 457 (4th Cir. 1993) — are a far cry from the situation here, where Plaintiffs apparently misunderstand the entirely accurate critiques of the United States' expert. Rather than raising legitimate professional responsibility concerns, Plaintiffs' unfounded allegations operate to distract the Court from the merits of the case, to which the United States now turns.

II. Dr. Starks's Reasonable Estimate of Damages is Closely Tied to the Evidence and Results from a Plausible and Achievable Alternative Investment Strategy

In their Reply Brief, Plaintiffs refer to Dr. Starks's damages calculation as an "*ipse dixit*" opinion — one supposedly made without evidence. That characterization is simply wrong. Indeed, elsewhere in their brief, Plaintiffs acknowledge that Dr. Starks's expert opinion regarding damages is grounded in "the Court's opinion," "the Government's policies, practices and investment objectives," and "financial and economic theory." Pls' Post-Trial Reply Br. at 8 (quoting Damages Trial Tr. 470:4-9) (Starks Cross). Dr. Starks was quite explicit in explaining how and why she weighed these factors in arriving at a reasonable calculation of damages:

- Dr. Starks selected a ***"buy-and-hold"*** investment strategy because that type of investment strategy is mandated by Interior's policies, *see* Damages Trial Tr. 345:15-352:11; 402:2-17 (Starks Direct); U.S. Post-Trial Br. at 7-12, and consistent with the actual investment of the Docket 326-K and 326-A Funds throughout their life, including in periods in which the Court found no issues with the way the Government invested Plaintiffs' funds. Damages Trial Tr. at 352:12-353:21 (Starks Direct).
- Dr. Starks chose a time-diversified laddered bond portfolio: an industry standard method of fixed income investing that manages interest rate risk and allows for flexibility in cases, like

this one, where the investment time horizon for a fund is uncertain. U.S.' Opening Post-Trial Br. at 13-17; Damages Trial Tr. at 408:9-409:16; 409:22-410:2; 412:15-19 (Starks Direct); JX 435 (Starks Damages Expert Report) ¶¶ 69-70, 83-84.

- Dr. Starks selected a one-to-ten year ladder portfolio — which holds bonds with maturities as long as ten years but maintains a five-year weighted average maturity until the 2004 Distribution Act — by examining the factual record, including the actual investments for the Docket 326-K Fund during the December 1992 to March 1997 prudent period. U.S.' Opening Post-Trial Br. at 24-27; Damages Trial Tr. at 352:21-353:14; 365:6-15 (Starks Direct); DX-2124 (Starks Demonstrative 30) at WSIG-TRIAL 107390; *Western Shoshone Identifiable Group, et al. v. United States*, 143 Fed. Cl. 545, 640 (2019) ("*Liability Opinion*").

Accordingly, there is no merit in Plaintiffs' suggestion that Dr. Starks has calculated damages based solely upon her "say so."

Plaintiffs also wrongly argue that Dr. Starks's damages calculations "conflict" with her prior testimony. *See* Pls.' Post Trial Reply Br. at 2, 9. Dr. Starks has at all times opined that, given the uncertainty surrounding the distribution of the Docket 326-K Funds prior to 2004, a range of different maturity structures would have been prudent. JX-435 at WSIG-TRIAL-08283; JX-423 (Starks Liability Expert Report) at WSIG-TRIAL-06981-82. But the Court's Liability Opinion narrowed and defined the range of prudence for the 326-K Funds, holding that Interior's investments in CDs with maturities of two years or less from August 1980 to December 1992 were too short-term, and that Interior's investments from December 1992 to March 1997 ranging from a weighted average years-to-call of 4.7 years to a weighted average years-to-call of 9.7 years lay within the range of prudence. *Liability Opinion*, 143 Fed. Cl. at 658-59. Dr. Starks's damages calculation conforms to the Court's opinion by adopting an alternative investment portfolio with a weighted average maturity that falls within the Court's prudent range.

Plaintiffs also label Dr. Starks's bond ladder portfolio "implausible" because Interior did not use a bond ladder to invest the Docket 326 Funds at issue, and because a bond ladder is allegedly at odds with how Interior invested the 326-K Fund during the 1992 to 1997 prudent period. Pls.'s Post-Trial Reply Br. at 11. But the trial record shows and Plaintiffs admit that a bond ladder portfolio is exactly the kind of buy-and-hold investment strategy that Interior's policies require. It is also a practical, straightforward, time-tested, and flexible strategy that the Interior Department and a broad range of other fixed income investors have used for decades to manage interest rate risk.[4] *See* Damages Trial Tr. at 412:15-19 (Starks Direct) (bond ladders "used a lot" by pension funds, endowments, foundations). In contrast to Plaintiffs' risky and hindsight-driven index model which *Plaintiffs admit Interior could not emulate in real world*, Dr. Starks's plausible and well-supported bond ladder portfolio offers the Court a reasonable basis for awarding damages in this case.

A. Dr. Starks's Buy-and-Hold Bond Ladder Portfolio Is Consistent with the Interior's Department's Policies and Practices

Plaintiffs do not dispute that the Interior Department was constrained in its investment of tribal trust funds by a "buy-and-hold" policy that, with limited exceptions, required Interior to purchase fixed income investments and hold them to maturity. *See* Pls.' Post-Trial Reply Br. at 23 ("The Government followed a predominantly buy-and-hold investment practice both before

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[4] Indeed, as shown in DX-2121 (OST, OTFM August 4, 1999 Meeting with Te-Moak Western Shoshone Tribal Council) at WSIG-TRIAL-10691, the Office of the Special Trustee presented a laddered portfolio approach to the Te-Moak Western Shoshone Tribal Council as early as August 1999. *See* Damages Trial Tr. at 260:9-261:3 (Nunes Cross).

and after 2000"); U.S.' Opening Post-Trial Br. at 7-12. Indeed, Plaintiffs' experts studied and acknowledged this constraint and testified at trial that "the Government actually did buy-and-hold stuff. It didn't turn over the bond portfolio every month." Liability Trial Tr. 1016:5-7 (Goldstein Direct). *See also* Damages Trial Tr. 201:2-202:8; 203:19-203:23 (Nunes Cross) (Interior was "adhering to a buy-and-hold concept 85 percent of the time."). Recognizing this important policy and practice, Dr. Starks calculated damages by constructing an alternative investment portfolio that followed a buy-and-hold strategy. U.S. Post-Trial Br. at 7-12; Damages Trial Tr. 408:23-410:25 (Starks Direct).

Plaintiffs do not argue — nor could they — that Dr. Starks's bond ladder portfolio is inconsistent with the Interior Department's policies and practices. Rather, Plaintiffs are left with the strained critique that Interior did not specifically use a bond ladder to invest the Docket 326 Funds at issue here. *See* Pls.' Post-Trial Reply Br. at 11. According to Plaintiffs, this makes Dr. Starks's alternative investment portfolio "completely implausible." *Id.* But the trial record shows that Interior often recommends and employs bond ladders for the investment of tribal funds. *See* U.S.' Opening Post-Trial Br. at 16; Damages Trial Tr. 258:21-266:25 (Nunes Cross); DX-2121 at WSIG-TRIAL-10691 (Te-Moak Western Shoshone Tribal Council); DX-2122 (Jicarilla Apache Tribe); DX-2123 (Pueblo of Laguna). Furthermore, Plaintiffs' argument, if accepted, *completely rules out* Plaintiffs' own damages calculations, which are premised upon a frequent trading strategy that Interior not only never used in managing the Funds, but which is *forbidden* by Interior's policies and *cannot be used* for *any* tribal fund under Interior's management. *See generally* U.S.' Post-Trial Br. at 40-43. Similarly, Plaintiffs argue that Dr. Starks's portfolio is "implausible" because it focuses on U.S. Treasury bonds and not agency securities. *See* Pls.' Post-Trial Reply Br. at 11. But this too is a critique that applies equally to

Plaintiffs' damages model which also uses the performance of U.S. Treasury bonds — not agency securities — to measure damages. *See* U.S.' Opening Post-Trial Br. at 37; Damages Trial Tr. 321:18-322:1 (Starks Direct) (Mr. Nunes combined data from "the United States Treasury Securities Index, which [includes] treasuries from one year to 30 years in maturity," "the UST long index, which has United States Treasury bonds that have at least ten years left to maturity," and "the UST 1-5 Year Index, which has Treasury bonds that have at least one year and to five years left in maturity.").

Ultimately, the measure of whether an alternative investment portfolio is "plausible" in this case has to be whether the alternative investments were permissible and prudent on an *ex ante* basis. In other words, what set of alternative investments would have been reasonable and appropriate during the breach periods at issue, in light of: Interior's policies and statutory constraints; the uncertain distribution date for the Docket 326-K Funds prior to 2004 (and prior to 1998 for the 326-A Funds); the Court's *Liability Opinion* regarding prudence; and fundamental principles of financial economics. Dr. Starks's damages calculations result from a careful consideration of these factors. As discussed further below, Dr. Starks's bond ladder portfolio not only complies with Interior's policies and practices but makes sense strategically as way of managing the risk associated with the uncertain timeline for the distribution of the Docket 326 Funds.

B. Dr. Starks's Time-Diversified Ladder Portfolio Flexibly Manages Uncertainty

Plaintiffs refer to Dr. Stark's ladder portfolio as a "rigid" approach. Pls.' Post-Trial Reply Br. at 11. That is not accurate. Indeed, the flexible and adaptive nature of a bond ladder is one of the key reasons Dr. Starks adopted this particular "buy-and-hold" strategy to measure damages. *See* JX 435 ¶¶63, 76, 83-84. Ladder portfolios are time-diversified, meaning that a laddered portfolio allows an investor to purchase across a range of maturities — in this case, bonds with maturities ranging from one-to-ten years. The approach allows the investor to hold longer-term bonds while retaining the flexibility to retire those longer-term bonds as they mature, and replace them with shorter-term bonds as necessary. *See Id*. at ¶¶83-84. And that is precisely how Dr. Starks proposes Interior could have managed the Docket 326 Funds during the breach periods, which were characterized by fundamental uncertainty regarding when the Funds would be distributed. Damages Trial Tr. at 366:15-20; 405:2-11; 412:20-413:5 (Starks Direct). A bond ladder also allows an investor to maintain an investment portfolio with a stable "duration" — "a stability in the [interest rate] risk of this portfolio over time." Damages Trial Tr. 412:11-14 (Starks). As Dr. Starks testified, her one-to-ten year bond ladder portfolio achieves such stability because it includes a balanced proportion of bonds across a range of maturities (10% of the investment in each of tranche of bonds). *See id.*

Dr. Starks's alternative portfolio for the Docket 326-K Fund is structured to achieve a five-year weighted average maturity during the 1980 to 1992 and 1997 to 2004 breach periods — periods where the timeline for distribution remained highly uncertain, and legislation requiring distribution of the Fund had not yet been passed. JX 435 ¶¶69-70; Damages Trial Tr. 408:9-409:16 (Starks Direct). For the 2004 to 2006 breach period, which followed passage of the Western Shoshone Judgment Fund Distribution Act in 2004, Dr. Starks's ladder portfolio adjusted to the nearer-term likelihood of distribution by becoming less exposed to interest rate risk — replacing retiring ten-year bonds with new shorter-term bonds. Damages Trial Tr. 409:17-410:2 (Starks Direct). Dr. Starks's alternative portfolio for the Docket 326-A Fund is also structured to achieve a five-year weighted average maturity during the breach periods up until 1998, at which point these funds were earmarked for long-term educational purposes. *See*

JX 435 ¶¶ 83-84; Damages Trial Tr. at 410:7-25 (Starks Direct).

Plaintiffs do not seriously attack this methodology except to contrast it with what Plaintiffs term the "ad hoc, variable manner in which the Government actually invested the 326-K Fund during the non-breach period." Pls.' Post-Trial Reply Br. at 11. But this critique makes little sense: Dr. Starks has proposed a plausible and prudent investment methodology that follows Interior's buy-and-hold policy and is designed to flexibly manage risk. The law requires nothing more. Indeed, if the parties were required to measure damages by emulating Interior's prudent period (1992-1997) investments in every possible respect, Plaintiffs' frequent trading damages model would fall much further short of that standard. As discussed below, Dr. Starks's one-to-ten year bond ladder portfolio is far more faithful to the record of investment from December 1992 to March 1997 that the Court has deemed prudent.

1. Dr. Starks's One-to-Ten-Year Bond Ladder Portfolio is Supported by the Trial Record, Including Interior's Record of Prudent Investment From December 1992 to March 1997

Plaintiffs criticize the investment time horizon Dr. Starks adopted for the pre-Distribution Act breach periods, but the five-year weighted average maturity of Dr. Starks's bond ladder portfolio is in synch with the Court's Liability Opinion and the actual record of investments during the December 1992 to March 1997 prudent period. As the Court is aware, from December 1992 to March 1997, Interior invested the Docket 326-K Fund in a portfolio of securities reflecting a weighted average years-to-call ranging from 4.7 years to 9.7 years. *See* JX-423, Ex. 2A at WSIG-TRIAL-07025-27; *Liability Opinion*, 143 Fed. Cl. at 658-59. The portfolio during this prudent period *never* reflected a weighted average years-to-call of 10 years, and exceeded 7.5 years only 20% of the time. DX-2124 (Starks Demonstrative 30) at WSIG-TRIAL-10730. For the vast majority of this prudent period (80% of the time), Interior's investments reflected a weighted average-years-to-call of 7.5 years or less, and about half the time (49% of the period) reflected a weighted average years-to-call of 6 years or less. *See id*. Damages Trial Tr. 365:6-15 (Starks Direct). Accordingly, Dr. Starks's one-to-ten-year bond ladder portfolio, reflects a five-year weighted average maturity that is consistent with the great weight of the investment activity the Court deemed prudent during the December 1992 to March 1997 time period.

Plaintiffs do not dispute this data, but attempt to construe it against Dr. Starks. Pls.' Post-Trial Reply Brief at 11. The data makes plain, however, that Dr. Starks's one-to-ten year bond ladder is far more similar to Interior's actual record of prudent investment than the model Plaintiffs propose. Plaintiffs' expert Mr. Nunes's model is based upon Interior constantly trading bonds before maturity to maintain a portfolio with a weighted average maturity of ten years — something Interior *never did* during the December 1992 to March 1997 time period. Indeed, the weighted average years-to-call for the Docket 326-K Fund was over 9.5 years for only 2% of the prudent period, and never met or exceeded 10 years. Mr. Nunes's 7.86 year alternative is not representative either: Interior invested in a portfolio with a weighted average maturity shorter than 7.86 years *80% of the time.*

Plaintiffs also argue that Dr. Starks's one-to-ten-year bond ladder portfolio is somehow inconsistent with Interior's contemporaneous guidance regarding tribal investments during the prudent period. Pls.' Post-Trial Reply Br. at 10. But, as Plaintiffs acknowledge and Dr. Starks observed, the director of the Office of Trust Fund Management, Fred Kellerup, advised a maturity structure between 3-7 years "if you have cash flow needs." *Id*. (quoting *Liability Opinion*, 143 Fed. Cl. at 662). That advice clearly applies to the Docket 326-K Fund, which was a judgment fund created for the very purpose of providing a single large cash flow to the Fund's beneficiaries at a time uncertain. Plaintiffs argue that "the Docket 326 Funds had no cash flow needs during the liability periods at issue in this case," Pls.' Post Trial Reply Br. at 10, but that is a factual statement *made in hindsight*, not a fair characterization of the possible cash flow needs of the Fund at the time it was being invested in the 1980s, 1990s, and 2000s.

Finally, it is noteworthy that Plaintiffs' Reply Brief studiously avoids any discussion of Dr. Longstaff's testimony, which among other things, supports Dr. Starks's selection of a one-to-ten year bond ladder portfolio with a 5-year weighted average maturity. *See* U.S.' Opening Post-Trial Br. at 49-51. The sensitivity analysis that Dr. Longstaff prepared and presented at trial showed that, viewing each investment contemporaneously and without the benefit of hindsight, and accounting for the risk-return tradeoff, a portfolio with a weighted average years-to-maturity of 5.7 years would have been optimal for the 1980-1992 and 1997-204 breach periods. Damages Trial Tr. 641:1-8; DX 2125 (Longstaff Demonstrative 20) at WSIG-TRIAL-10791.

* * *

In short, Plaintiffs' central critique of Dr. Starks — that her damages model is supposedly "based entirely on her own *ipse dixit* opinions" — is simply inaccurate and contradicted by the trial record. Rather, Dr. Starks's plausible and substantial damages estimate is supported by the evidence, complies with this Court's Liability Opinion, and offers the only reasonable basis for a damages award in this case.

III. Plaintiffs' Model Is Implausible, Reflects an Untenable Investment Strategy, Reaches for Yield, and Does Not Offer the Court an Appropriate "Benchmark"

In their Reply Brief, Plaintiffs continue to insist that Mr. Nunes's damages model offers the Court a "neutral" and "objective" benchmark from which the Court may award damages consistent with a "market average return." This characterization of Mr. Nunes's damages calculation could not be further from the truth, and Plaintiffs continue to ignore or downplay the several obvious ways in which Mr. Nunes has used hindsight and exercised his own subjective judgment to inflate his damages calculations:

- ***Mr. Nunes's Index Model is a Synthetic Compilation of Barclays Indexes***

Instead of using the Barclays U.S. Treasury Index, as he did in the *Jicarilla Apache Nation v. United States* case, *see* 112 Fed. Cl. 274, 306 (2013), Mr. Nunes combined elements of three different Barclays indexes to create his own synthetic compilation. Damages Trial Tr. 31:21-24 (Mr. Nunes "used combinations of the Barclays UST, the Barclays Long-Term, and the Barclays 1-5 UST") (Pls.' Opening Arg.). Thus, Mr. Nunes is measuring a curated market that he created by mixing and matching the Barclays UST, UST Long and UST 1-5 indexes. Damages Trial Tr. 321:20-322:1 (Starks Direct).

- ***Mr. Nunes Combined The Indexes In A Damages-Maximizing Way***

In combining and weighting the various Barclays indexes, Mr. Nunes made specific decisions that affected the *performance* of those indexes over time, driving millions in extra damages. *Id*. at 323:2-6; 321:13-324:19 (Starks Direct); DX 2124 (Starks Demonstrative 20) at WSIG-TRIAL-10720.

- ***Mr. Nunes Selectively Deploys His Index Model to Shield Losses During Periods of Rising Interest Rates***

Instead of using his synthetic index model to "benchmark" damages during each breach period, Mr. Nunes selectively deploys his model, avoiding tens of millions in losses that would have occurred had Interior actually invested in accordance with his model during periods of rising interest rates. It is undisputed that this aspect of Mr. Nunes's calculations increases damages by more than $30 million in both his 10-year and 7.86-year models. JX-438, Ex. 1 at WSIG-Trial-08472; ; DX 2120 at WSIG-TRIAL-10683.

These manipulations are completely inconsistent with the idea that Plaintiffs have offered the Court a neutral "market"-driven benchmark and instead demonstrate that Mr. Nunes's calculations result from subjective and damages-maximizing decisions.

Beyond its obvious subjectivity, Mr. Nunes's model requires investments that Plaintiffs concede are inconsistent with Interior's policies and practices. Plaintiffs acknowledge that an investor could not emulate the Barclays indexes without buying and selling before maturity hundreds of securities monthly in order to realize and reinvest capital gains. Pls.' Post-Trial Reply Br. at 20. And Plaintiffs do not dispute that such a practice is completely forbidden by Interior's investment policies. Mr. Nunes's model also targets long-term investments without *any* analysis of risk — a flawed approach that Dr. Longstaff described as "reaching for yield." U.S.' Opening Post Trial Br. at 46-49. Plaintiffs ignore and completely fail to rebut Dr. Longstaff's well-founded criticisms on this point.

Furthermore, Plaintiffs' interpretation of the *Warm Springs* decision is untenable. Plaintiffs are not permitted to look back in time and choose as a measure of damages the earnings from an investment strategy that hindsight reveals to be the "most profitable" regardless of its plausibility. Rather, the Court must find that any proffered measure of damages would have resulted from investment activity that was plausible and achievable *ex ante*. Because Plaintiffs' damages model fails that standard, the Court must reject Plaintiffs' damages calculations.

A. Plaintiffs' Synthetic Model Does Not Measure A "Neutral" "Market Average"

One of the many advantages of Professor Starks's damages calculation is that it results from an investment strategy that BIA could have actually implemented during the breach periods. By contrast, Mr. Nunes does not even pretend to offer a real-world but-for portfolio:

> Q. . . .And, in fact, it would be impossible to do so, wouldn't it, to — for BIA to replicate this – the bond index that you're proposing as a benchmark for measuring damages?
>
> A. You know, certainly the further back in time you go, where the technology was very different, I would say that's a fair statement. Coming forward to a more present time, with the advent of technology, you might not be able to get it exactly, but you could – you could model it pretty closely if that was your goal.

Damages Trial Tr. 239:3-12 (Nunes Cross). Plaintiffs are candid about the fact that Mr. Nunes has declined to provide the Court with *any* realistic but-for investment strategy. Pls.' Post-Trial Reply Br. at 18 ("RHA's benchmarks are not an investment strategy"); *id*. at 18-19 ("RHA is 'absolutely not' saying that the Docket 326 Funds should have been invested in a manner that mimics the Barclays indexes" (quoting Damages Trial Tr. 111:2-5 (Nunes Direct))); *id* at 19 ("RHA 'steadfastly refrain[s] from dictating any strategy for managing the funds whatsoever'") (quoting Damages Trial Tr. 279:3-5 (Nunes Redirect))). Instead, Plaintiffs claim that the "benchmarks" they propose to measure damages here provide a "neutral and objective" measure of "market-average returns." Pls.' Post-Trial Reply Br. at 24-28. We have elsewhere refuted this argument, U.S.' Opening Post-Trial Br. at 34-36, which is both misleading and incorrect.

As an initial matter, as discussed below, the average "market" return used by RHA contemplates a market in which investors hold mostly long-term bonds and systemically sell those bonds before maturity. A "market" return that is instead premised on a buy-and-hold investment strategy would provide a different "market" return, but for a market in which bonds are held until maturity. Indeed, Dr. Starks's "ladder" can be considered to be such a buy-and-hold market return. The ladder is simply a "do-it-yourself" bond mutual fund. In the case of Dr. Starks's ten-year ladder, this simplified "mutual fund" would consist of just ten bonds (or ten tranches of bonds), of ten different maturities, ranging from one-to-ten years. *See* JX-435 at WSIG-TRIAL-08281, 08286-89; Damages Trial Tr. 403:20-404:22; 407:3-17 (Starks Direct).

Second, RHA's damages approach is based on a "market" that considers bonds ranging from one year to maturity to 30 years-to-maturity. Obviously, this "market" return would be much different than another, in which bonds of different maturity ranges are considered, such as by Dr. Starks's one-to-ten-year ladder.

Third, the breach period damages that RHA proposes are not market returns at all, but earnings generated by a synthetic combination of various bond indexes that have been blended and subjectively weighted. As Dr. Starks showed at trial, changing only the weights RHA selected to blend the various so-called benchmarks it considered resulted in at least 87 alternative returns. In regards to the number of possible ways to create the RHA benchmark, Dr. Stark's claims "there are limitless ways you could have combined those [] indexes" with Dr. Starks providing 87 unique weightings of the indexes. See Damages Trial Tr. at 331:3-8; 334:9-20 (Starks Direct). Dr. Starks's analysis showed that, far from being an "average," the returns RHA calculated in its model were among the highest possible. *Id.* at 334:21-335:2 (Starks Direct). Plaintiffs now contend that Mr. Nunes did not intentionally choose the greatest damages-maximizing combination of the indexes, Pls.' Post-Trial Reply Br. at 24, but it is clear, for example, that Mr. Nunes *completely excluded* the Barclays UST 1-5 Index from its synthetic index for its 10-year model, weighing the UST Index 86.05% and the UST-Long Index 13.95% to generate $8 million more in damages than had he weighted the subject indexes to instead exclude the UST Index, as Dr. Starks showed. DX-2124 (Starks Demonstrative 20) at WSIG-TRIAL-10720. To the extent Mr. Nunes's damages calculations reflect "market average" returns, it is the returns on a particular investment combination that was *hand-picked by Mr. Nunes*. Damages Trial Tr. 342:14-19 (Starks Direct).

Fourth, Mr. Nunes's artificial transition periods, which are hindsight- and results-driven, U.S.' Opening Post Trial Br. at 60-65, obviously abandon any pretense of an "objective and neutral" market measure. *See* Damages Trial Tr. 240:24--241:1 (Nunes Cross) ("Q. In what sense is your transition period a reflection of market average performance? A. It isn't.").

To summarize, Plaintiffs have no basis to expropriate the notion of a "market average" to brand their very specific and results-driven "measure" of but-for performance. Accordingly, RHA does not reflect a "market-average" return, let alone provide an investment return that would be consistent with the Government's contemporaneous policies and practices.

B. Plaintiffs' Damages Model Here is Not The Same Model Used in *Jicarilla*

Throughout the trial of this case in 2017 and 2020, Plaintiffs constantly referred to the decision in *Jicarilla*, 112 Fed. Cl. 274 (2013) as a point of comparison. The Court has observed that *Jicarilla* "is not binding on this court and the specifics presented for review in this case are different from any of the previous cases." *Liability Opinion*, 143 Fed. Cl. at 628. The United States does not believe that the damages ruling in that case is instructive here or applicable to the very different factual scenario presented in this case. Nevertheless, Plaintiffs continue to insist that *Jicarilla* validates the "benchmark" approach to calculating damages that Plaintiffs' advocate here. Pls.' Post-Trial Reply Br. at 18. In that context, it is important to understand that the flawed and implausible damages model that Plaintiffs have put forward in this case is simply *not* the same one Judge Allegra accepted in *Jicarilla*.

In *Jicarilla* the Court accepted the idea that the Barclays UST Index – representing all outstanding Treasuries with maturities between one and thirty years – represented a "market" measure against which BIA's investment returns might be measured. *Jicarilla*, 112 Fed. Cl. at 307. That holding is incompatible with this Court's Liability Opinion, in part, because the UST Index includes a substantial number of bonds with maturities between 15 and 30 years: a much longer investment time horizon than the 5-10 year investment time horizon the Court found prudent. *See Liability Opinion*, 143 Fed. Cl. at 639-41 (finding a portfolio with 5-10 year maturity prudent in light of distribution uncertainties, and rejecting Mr. Nunes's contention that WSIG funds during this period should have been invested "in even longer-term investments than those selected by the government, with an average weighted maturity of approximately fifteen years."). Moreover in this case, unlike in *Jicarilla*, there is a real world template — the December 1992 to March 1997 prudent period — for the Court to consult in determining an appropriate measure of damages. *See* U.S.' Opening Post-Trial Br. at 54-57.

But in *Jicarilla*, where the Court accepted a "benchmark" approach, the UST Index "benchmark" came much closer to representing an *objective* "market measure" for Treasuries than does the synthetic portfolio Mr. Nunes created for the damages trial in this case. The UST Index, used all by itself, and without Mr. Nunes's *ad hoc* "transition periods" and *ad hoc* conglomeration of multiple indexes, at least represents the entire universe of outstanding Treasury bonds and notes (excluding "T-bills" with maturities under one year). Thus, when Judge Allegra looked to Mr. Nunes's model as a benchmark, he was at least evaluating Interior's investment performance against a "market" that Mr. Nunes had not manipulated through subjective decision-making for purposes of calculating damages.

Notably, evidence in the record suggests that had Mr. Nunes used the UST Index as the "benchmark" for the breach periods here, Mr. Nunes's damages calculations would have been substantially lower. The United States' experts in the 2017 trial in this case demonstrated that using the UST Index in Mr. Nunes's original damages model would have reduced his damage calculation at that time by more than fifty percent – from $216.3 million to $106.4 million. DX-2012 (Dec. of Gordon Alexander) at WSIG-TRIAL-07518; Liability Trial Tr. 857:11-22 (McLean Direct); McLean Demonstrative Ex. 18. And that damages figure, $106.4 million, was based upon a calculation that the United States was in breach for the entire thirty-four year life of the Docket 326-K Fund; it does not account for the Court's subsequent finding that for a substantial number of years the government acted prudently.

In short, Mr. Nunes did not use the "market measure" here that he proffered in *Jicarilla*, and had he done so, his damages estimate would likely have resulted in tens of millions less in damages.

C. Plaintiffs' Argument that the Interior Department Measured itself Using Barclay's Indexes is Incorrect

Plaintiffs continue to argue that BIA's isolated references to treasury indexes constitute admissions that Mr. Nunes's synthetic but-for portfolio is an "[]appropriate measure[] of the performance [BIA] could achieve with its investment policies." Pls.' Post-Trial Reply at 23. As we have shown (U.S.' Opening Post-Trial Br. at 52-54), there are several problems with the argument. Plaintiffs purport to respond to only one of these problems – the fact that the documents they rely upon all postdate the important damages periods at issue.

In their Reply, Plaintiffs cite two documents: (1) JX 375, an Office of the Special Trustee for American Indians ("OST") Investment Policy, dated September 30, 2004; and (2) PX 1002, an OST Power Point presentation made in November, 2005. Neither document supports Plaintiffs' case. The 2004 Policy manual (JX 375) primarily covers OST procedures, databases, and forms. Plaintiffs rely upon Appendix B to the manual, which provides a glossary of definitions. Entry number 60 to Appendix B describes the "Shearson Lehman 1-5 year Government Bond Index" as "[t]he benchmark that OST measures its performance against." JX-375 at WSIG-TRIAL-05120.

Because none of the voluminous materials gathered for this litigation contain any other references to this short-term bond index as an OST performance "measure," it is unclear whether and to what extent this document sheds light on Interior's investment practices. A later (2011) version of the same policy manual, for example, says nothing about using a short-term bond index as a "measure." JX-410 at WSIG-TRIAL-05902. But even if Interior did use the Lehman short-term index as a performance measure, that fact would provide absolutely no support for Plaintiffs' use of the UST and UST Long indexes to calculate damages. Furthermore, in its substantive discussion of investment policy, JX-375 strongly confirms Professor Starks's damages analysis and specifically disavows the risk-laden frequent repurchasing that Mr. Nunes's model assumes. The manual states, for example, that "[a] Tribe's investment portfolio is designed to increase a portfolio's potential return *and reduce the exposure to market reinvestment risk*. This is achieved *by structuring the portfolio in a 'laddered' fashion consisting of a variety of security types and maturity dates*." JX 375 at WSIG-TRIAL-05067 (emphasis added).

The other document Plaintiffs cite, PX-1002, is a one-page excerpt from a 2005 Power Point Presentation.[5] The excerpted page refers to Lehman indexes as “examples” of “performance benchmark[s],” specifically identifying the short- and intermediate-term indexes. WSIG-TRIAL-10702. Though it may be true that indexes such as these are used by some investors as performance benchmarks, that fact lends no credibility to the synthetic portfolio Mr. Nunes hypothesizes —one that requires a significant departure from the Government’s overarching practice of buying and holding securities. Using a short- or intermediate-term bond index as a performance benchmark (assuming Interior ever actually did so) only highlights the synthetic and artificial nature of Mr. Nunes’s model, with its *ad hoc* transition periods, amalgamation of a *total* market bond index with a *long-term* bond index, and with its routine and massive harvesting of capital gains in flagrant violation of BIA policy and basic principles of risk management.

D. Plaintiffs’ Model Presupposes a Specific, Risky and Implausible Investment Strategy

In the United States’ Opening Post-Trial Brief, we explained that, “[i]n practical terms . . . . any investor trying to emulate the performance of the Barclays indexes, would have to buy and sell bonds each month to match the index.” U.S.’ Opening Post-Trial Br. at 36 (citing Damages Trial Tr. 321:7-12, 327:2-327:13 (Starks Direct)). Plaintiffs now admit the point, acknowledging that “[t]his statement is true.” *See* Pls.’ Post-Trial Reply Br. at 20. That concession ought to be dispositive on the issue of “plausibility,” because, as Plaintiffs also admit,

[5] Plaintiffs (Pls’ Post Trial Reply Br. at 23) again cite WSIG-TRIAL-10824, which is the electronic exhibits and source backup associated with Dr. Starks’s Surrebuttal report. As we have noted before (*see* U. S.’ Opening Post Trial Br. at 52 n.5) the relevance of this citation is not apparent.

the Interior Department follows a buy-and-hold policy and could not buy and sell bonds each month to match the capital gains reflected in the Barclay's indexes. *See* Liability Trial Tr. 1016:5-7 (Goldstein Direct)*; see also* Damages Trial Tr. 201:2-202:8; 203:19-23 (Nunes Cross).

But Plaintiffs would have the Court believe that somehow the Interior Department could still have earned a performance commensurate with the Barclay's indexes by holding bonds to maturity. Pls.' Post-Trial Reply Br. at 21 (Mr. Nunes's "model simply assumes that a prudent investment strategy of whatever kind – passive buy-and-hold, or active trading — would have yielded" "a rate of return" commensurate with the Mr. Nunes's "benchmarks"). That is just not so, and Plaintiffs do not explain how it could be. Rather, the lion's share of the damages Mr. Nunes calculates through his model constitute *capital gains* created by the routine, wholesale liquidation of securities before maturity. Buy-and-hold investment strategies do not generate capital gains, and no buy-and-hold strategy could have competed with Mr. Nunes's model that sells long-term securities at a gain during what he *knows in hindsight* was a declining interest rate environment.

The United States showed at the liability trial that the vast majority of the damages claimed at that time were capital gains. Liability Trial Tr. 862:20-863:12 (McLean); McLean Demonstrative 20. And as Dr. Starks explained, the only way those capital gains can be generated is by active trading. Liability Trial Tr. 697:17-698:3 (Starks Direct); *see also Id.* at 1210:18-1211:8 (McLean Cross). Because the mechanics of Mr. Nunes's damages model is unchanged today (*see* JX 434 at WSIG-TRIAL-07586), the problem is unchanged.

For his part, Mr. Nunes did not and could not disagree with the dominant role that capital gains play in his calculations.

Q. Did you do any calculation to determine how much of the gains shown by your benchmark portfolio are attributable to capital gains due to the sale of securities before maturity?

A. No, because the quarterly return figure we use is the market average return that we want.

Q. And that shows total return.

A. That's correct.

Q. Okay. And so that's the total return consists of both the interest payments and the capital gains realized from the sale of securities before maturity.

A. Right. Consistent with the way, you know, investments are gauged anyway.

Q. Okay. But you made no effort to determine what percentage of the total gains shown by your model are attributable to capital gains versus interest payments.

A. No, we did not.

Damages Trial Tr. 235:23--236:14 (Nunes Cross). Nor could Mr. Nunes deny the fact that Interior could harvest these capital gains only by violating their buy-and-hold policy, because the gains can only be realized by selling securities before maturity (assuming a falling bond market; in a rising market, premature sales result in loss of principal). *Id*. at 237: 1-4 (Nunes Cross) ("Q. If an investor is buying and holding securities until maturity, they will not realize capital gains from sales before maturity, will they? A. No. . . ."").[6]

In response to these facts Plaintiffs invoke their rebuttal expert from the liability trial: "As Dr. Goldstein explained, '[a]s long as an investor follows a buy-and-hold strategy, they can benefit from locking in rates while realizing no capital gains or losses.'" Pls.' Post Trial Reply Br. at 22 (quoting JX-425 (Goldstein Liability Expert Report), WSIG-TRIAL-07142, ¶ 173.).

[6] Reported gains in the value of the Barclays treasury indexes also reflect increases in value due to falling interest rates. As Mr. Nunes acknowledged at trial, these gains are also unrealizable by an investor adhering to a buy-and-hold strategy. This is because the increased security values reflected in the indexes' mark-to-market valuation can only be monetized if the individual securities are sold to "lock in" those gains. Damages Trial Tr. 255:21--257:2 (Nunes).

Dr. Goldstein's analysis is indeed revealing. As Mr. Nunes acknowledged at the damages trial, Dr. Goldstein showed that if Interior had simply invested the Docket 326-K Fund in a portfolio of 10-year bonds throughout its thirty-four year life, and adhered to the agency's buy-and-hold policy (and thus refrained from gambling on capital gains) the resulting damages would be $72 million. Damages Trial Tr. 242:17-243:11 (Nunes Cross); *see* JX-425 at WSIG-TRIAL-07082 (Goldstein); *Liability Opinion*, 143 Fed. Cl. at 567. To be clear, Dr. Goldstein's purpose was not to offer a damages calculation; he intended instead simply to illustrate the fact that Interior, consistent with its buy-and-hold policies, could have earned more for the 326-K Fund. JX-425 at WSIG-TRIAL-07121. But the exercise vividly illustrates the extent to which Mr. Nunes's damages modeling relies on the kinds of capital gains that BIA is not allowed to chase.

> Q. . . . Now, Mr. Nunes, to make sure that I'm not misleading anybody, yourself or the Court, I wanted to bring special attention to this language where – and for the record, we're looking at Joint Exhibit 425 at Bates page 7121, where Dr. Goldstein wrote, in reference to his ten-year and 20-year buy-and-hold strategy analysis, and I'm quoting, "I stress that these are not damage estimates, which I have not been asked to provide. The figures are just a clear way to illustrate the benefits of locking in typically higher long-term rates over the relevant time period." Do you see that?
>
> A. I do, yes.
>
> Q. Okay. And so if Dr. Goldstein's analysis was not intended to provide a damage estimate but it was intended to demonstrate that even if -- as I understand it, even if you took out capital gains, BIA could have made a lot more money by buying and holding longer term maturity -- a longer term instrument. Now, do you share that opinion, that BIA could have significantly increased the return for the Western Shoshone if they had bought longer term instruments, even though they adhered to a buy-and-hold policy?
>
> A. Yes.
>
> Q. But your use of the Barclays benchmark doesn't quantify that -- what damages that would be, because your benchmark incorporates a substantial amount of capital gains derived from the sale of securities before maturity.
>
> A. If by that you mean market average performance, yes.
>
> MR. DYKEMA: May I ask the reporter to read back the question, please.

(The record was read as follows:)

"QUESTION: But your use of the Barclays benchmark doesn't quantify what damages that would be, because your benchmark incorporates a substantial amount of capital gains derived from the sale of securities before maturity.

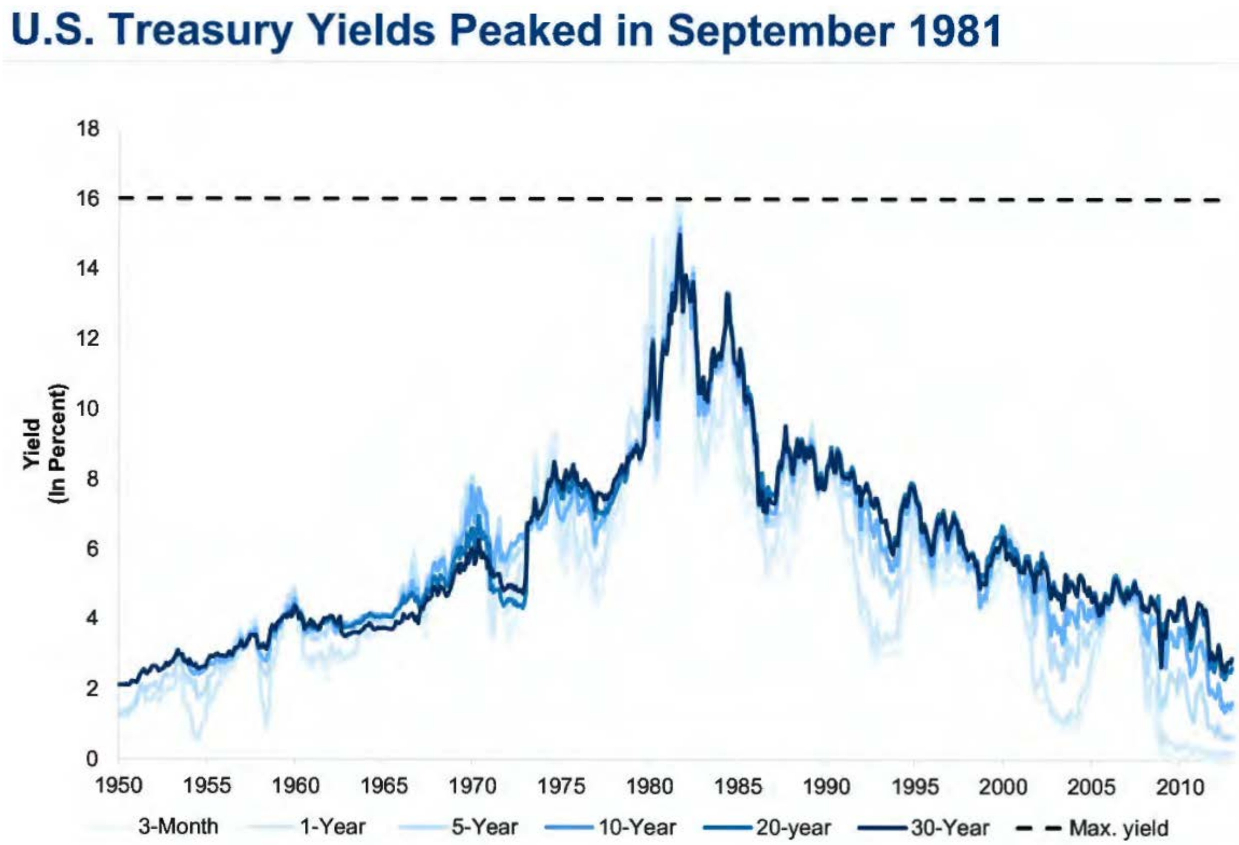
Q. Mr. Nunes, is the answer to that question yes or no?

A. Yes.

Damages Trial Tr. 244:10-246:1 (Nunes Cross). It is no coincidence that Dr. Goldstein's illustrative buy-and-hold portfolio, consisting of ten-year treasuries, produces a damage estimate ($72 million) for the Docket 326-K Fund quite similar to that produced by Professor Starks's ten-year ladder portfolio ($73,816,515). Both calculations assume that Interior adhered to its buy-and-hold policies which, as we have shown, Interior actually did. U.S.' Opening Post-Trial Br. at 11-12. Mr. Nunes's model, by contrast, assumes that Interior would hold *none* of its securities to maturity. Damages Trial Tr. 568:12-15 (Starks Redirect).

E. Mr. Nunes's Model Abuses Hindsight Knowledge and Ignores Risks

As the United States has demonstrated at trial and in prior briefing, the reason why Mr. Nunes's frequent trading model generates such substantial capital gains over the breach periods is because the periods at issue were characterized predominantly by falling interest rates. *See* DX-2124 (Starks Demonstrative 41) at WSIG-TRIAL-10741:



In hindsight, Mr. Nunes knows that, on the whole, when the portfolio of bonds in his Barclays indexes rebalances each month during the breach periods, falling rates will have caused the bonds to increase in value, and the monthly sales of those bonds will generate gains instead of losses. Mr. Nunes weaponizes this hindsight information to construct a damages approach that, *ex ante*, would have been risky for Interior to adopt — even if the agency was permitted to buy and sell securities in the manner Mr. Nunes's index approach requires. *See* Damages Trial Tr. 617:2-14; 620:16-25 (Longstaff Direct) (discussing the risks of a frequent trading strategy).

Plaintiffs' damages model also abuses hindsight knowledge in its adoption of "transition periods" to shield losses that would have occurred during periods of rising interest rates. *See* U.S.' Opening Post-Trial Br. at 60-65. Plaintiffs attempt to defend Mr. Nunes's use of transition periods by arguing that Interior would have been wise to gradually phase in a longer-term investment strategy over the course of a year. Pls.' Post-Trial Reply Br. at 28-29. But Dr. Longstaff and Dr. Starks both debunked this idea, explaining that $26 million is an amount of money that could be deployed straight away into the liquid set of U.S. Treasury bonds that comprise Mr. Nunes's model. *See* U.S.' Opening Post-Trial Br. at 64. More importantly, however, the use of transition periods completely contradicts the stated premise of Mr. Nunes's model. Mr. Nunes says that he has constructed "a plain vanilla, nonsubjective, nonhuman intervention index that says here's what the market did." Damages Trial Tr. 232:8-13 (Nunes Cross). In reality, Mr. Nunes used hindsight to avoid periods of rising interest rates where his "benchmark" index would have produced losses, and fully deploys his index over periods where interest rates fell, bond prices soared and the "benchmark" produced capital gains. *See* Damages Trial Tr. 178:24-179:6 (Nunes Cross); 378:5-382:15 (Starks Direct).

The law does not allow for hindsight to play such a role in the calculation of damages. As discussed in our opening brief, Plaintiffs must prove damages based upon the earnings that the Interior Department *plausibly* could have earned in the absence of a breach. *See Confederated Tribes of Warm Springs Reservation of Or. v. United States*, 248 F.3d 1365, 1371 (Fed. Cir. 2001). "Plausible" alternative investments must be prudent investments. *See Evans v. Akers*, 534 F.3d 65, 74 (1st Cir. 2008) ("Losses . . . from breaches of the duty of prudence may be ascertained, with the help of expert analysis, by comparing the performance of the imprudent investments with the performance of a prudently invested portfolio."). And prudence is evaluated *ex ante*, considering information available at the time of those investments. *See Liability Opinion*, 143 Fed. Cl. at 612. As Plaintiffs acknowledge in their opening Post-Trial Brief, "[a] return projection for 'properly invested' funds should reflect the standards of prudent investment … and should not rely on hindsight … in selecting a benchmark … for hypothetical performance." *See* Pls.' Opening Post-Trial Br., ECF No. 201 at 15, citing Restatement (Third) of Trusts, Liability of Trustee for Breach of Trust § 100 cmt. (b)(1)(2012).

Plaintiffs have nevertheless argued that their hindsight calculations are supported by the *Warm Springs* case which allows them to put forward the "most profitable" alternative damages approach. *See* Pls.' Post-Trial Reply Br. at 14. But *Warm Springs* requires that damages calculations be "plausible," prudent and profitable at the time of the breach — not just profitable in hindsight. *See* 248 F.3d at 1371 (only when two investment strategies "would have been equally plausible" may the Court accept the "most profitable" of the two).

When viewed *ex ante*, Plaintiffs' proposed approach is neither plausible nor prudent. Nor would it have been expected to be the "most profitable." Rather, as Dr. Longstaff demonstrated, Plaintiffs' selection of a long-term investment time horizon (10 years or 7.86 years) "reaches for yield" without weighing the risks, *see* U.S.' Opening Post-Trial Br. at 46-49, and their frequent trading approach to investing presents substantially greater risks of loss than the buy-and-hold strategy Dr. Starks advocates (and Interior requires). *See* Damages Trial Tr. 618:20-619:20 (Longstaff Direct); *See* DX 2125 at WSIG-TRIAL-10778-80 (Longstaff Demonstrative Exs. 7-9). Plaintiffs' Post Trial Reply Brief does not discuss Dr. Longstaff's testimony and fails to respond to Dr. Longstaff's criticisms in any way. Indeed, Plaintiffs offer *no explanation* why — without the benefit of hindsight — the investment approach they advocate makes sound financial sense.

F. The Court Should Reject Plaintiffs' Claim for Prejudgment Interest

Plaintiffs insist that their post-2013 claims are for "damages" not "interest," Pls.'s Post-Trial Reply Br. at 32-35, but, at least with respect to the Docket 326-K Fund, it is hard to understand the logic of Plaintiffs' argument. As the parties agree, when determining the amount of damages due to the beneficiary, the court should "attempt to place the beneficiary in the position in which it would have been absent a breach." *Warm Springs*, 248 F.3d at 1371. Here, the Docket 326-K Fund beneficiaries received distributions of the Western Shoshone Judgment Fund between 2011 and 2013.[7] *See Liability Opinion*, 143 Fed. Cl. at 652. It would place those beneficiaries in the position they would have occupied but-for the breach to compensate them for the amount of investment income they would have earned but-for the breach as of the time the Fund was fully distributed in September 2013. Recognizing that principle, Dr. Starks's calculations include $60 million in damages from 2006 to 2013 (a non breach period) — representing the amount of lost investment income that would have been available to Plaintiffs at the time of distribution. *See* U.S.' Opening Post-Trial Br. at 70 & Ex. 1. It is unclear why Plaintiffs should be paid *yet more damages* based on the *legal fiction* that the United States did not pay Plaintiffs in 2013 and instead continued to hold and invest the Docket 326-K Fund and for another *seven years*.

The United States does not agree with Plaintiffs that the non-binding *Osage* case stands for this proposition. *See* Pls.' Post-Trial Reply Br. at 32 (citing *Osage Tribe of Indians of Okla. v. United States*, 75 Fed. Cl. 462 (2007)). *Osage* involved a fact pattern in which the United States breached an ongoing duty to collect royalties on oil and gas leases and pay them out quarterly as part of an ongoing trust. 75 Fed. Cl. at 480-81. Because the United States did not

[7] This Court recognized that following the 326-K Fund being "virtually paid out" by November 2012, a residual amount of $36,000 remained which Plaintiffs did not seek to recover. *Liability Opinion*, 143 Fed. Cl. at 652. Undersigned counsel understands that the $36,000 amount consisted of unsuccessfully attempted payments which were later successfully delivered to Fund beneficiaries. Undersigned counsel understands that following those distributions, a *de minimis* principal amount of $5 which could not feasibly be distributed to the Fund beneficiaries remains in the account under Interior's management.

collect the royalties, it did not disburse them and Judge Hewitt held that the United States should pay interest through the time of judgment on the royalties that it should have collected and disbursed but did not. *Id.* at 481 ("plaintiff is entitled to interest up to the date the money is paid over"). *Osage*, therefore, is actually a case in which the Court ordered payment of interest through to the time of judgment — *i.e.* prejudgment interest — a form of compensation Plaintiffs admit is unavailable to them and which they claim they are not seeking.

Furthermore, in this case, as opposed to *Osage*, the United States actually paid out the 326-K Fund by 2013. It would defy reality and would overcompensate Plaintiffs to assume, as Plaintiffs do, that the United States continued to hold and invest for an additional seven years the $73,816,515 million in additional income (damages) that Dr. Starks calculates the United States realistically could have earned by the actual date of the 326-K Fund's distribution.

To the extent the Court finds *Osage* persuasive or otherwise determines that the payment of "interest damages" between 2013 and 2020 is appropriate, the Court should award damages for the Docket 326-K and Docket 326-A Funds in line with Dr. Starks's calculations, which calculate the time value of money between the end of the alleged breaches and trial. *See* DX-2120.

CONCLUSION

For the foregoing reasons, the Court should reject Plaintiffs' implausible damages calculations and adopt Dr. Starks's reasonable, plausible and substantial estimates of damages: no more than **$73,816,515** for the breaches of trust associated with the Interior Department's management of the Docket 326-K Fund, and no more than **$987,920** for the breaches of trust associated with the Interior Department's management of the Docket 326-A-1 and Docket 326-A-3 Funds.

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